84-810 (T)

NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

MAX SCHNEIER,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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126 pp

## QUESTIONS PRESENTED

1. Whether respondent Commissioner can constitutionally promulgate a Revenue Ruling which repeals a long-standing specific,unequivocal,vested,statutory and regulatory right and privilege,thus divesting petitioner-(and countless other taxpayers similarly situated)-of the ability to take his (and their) stepchildren as dependency exemptions and,as a result, depriving him (and them) of property gained by exercising that vested right and privilege upon which he (and they) justifiably relied?

a. Whether a United States District Court of Appeals can constitutionally uphold and sanction such repeal and deprivation?

b. Whether a United States Court of Appeals can constitutionally decide a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States?

## LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

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## CONSTITUTIONAL PROVISION INVOLVED

1. Article I, Section 8 [1] of the United States Constitution provides in relevant part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises * * *

2. Article I, Section 8 [18] of the United States Constitution provides that Congress shall have Power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States,or in any Department or Officer thereof.

3. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life,liberty,or property,without due process of law * * *

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| 1. Opinion,United States Court of Appeals For the 9th Circ. No. 83-7533, filed June 15, 1984. | App.A pp,1a-10a |
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| 4. Memorandum Findings of Fact and Opinion; United States Tax Court No. 8277-82 | App. A pp,14a -29a |
| 5. Stipulations of Facts Docket No. 8277-82 dated April 4, 1983. | App. A pp,30a -35a |

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO.

MAX SCHNEIER,
Petitioner,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Max Schneier, pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App.A,infra,1a-10a) has not been officially reported. The opinion of the Tax Court (App.A, infra,14a-29a) has not been officially reported.

## JURISDICTION

The final judgment of the court of appeals was stayed on August 14,1984,pending

this timely application for a writ of certiorari (App.A,infra,13(a). A timely petition for rehearing and suggestion for a rehearing en banc, was denied on July 31,1984 (App.A,infra 11a-12a) The final judgment of the tax court was entered July 6, 1983 (App.A,infra,30(a). The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c).

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## STATEMENT OF THE CASE

1. Petitioner timely filed a joint tax return for calendar year 1978 with his then wife to whom he was legally married. (See Stipulation of facts (2)(5) App.A, infra,p,32a-33a.) On that joint return, he claimed as dependency exemptions his two then stepsons. (See Stipulation of Fact (6)(7),(App.A,infra,p,33a.) Petitioner claimed his dependency exemptions in accordance with existing statutes[1/] and regulations.[2/]

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1. 26 USCA 151(a)(e)(1)(3); 152(a)(2) or (9); 6013(a)(d)(3). (App.B,infra,pp, 1b-4b for relevant parts)
These statutes grant,inter alia, a stepfather the specific and unequivocal right to take his stepchildren as dependent exemptions on his joint tax return if he provides more than half of their support and they are members of his household for more than half a year.

2. 26 CFR 1.151-1(a);2(a)(b);3(a); 1.152-1 (a)(1);2(i);(b);(c); 1.152-2(a)(1);(d); 1.152-4(a);(d)(1)(2); ; 1.6013-1 (a);4(a)(b);5(c). (App.B,infra,pp, 7b-12b, for relevant parts)
These Treasury regulations inter alia support the aforesaid statutes without qualification.

During 1978,petitioner's two stepsons were minors (See Stip.(6),App.A,infra,p, 33a),and were members of his household for almost that entire year.(See Stip. (7),App.A, infra, p, 33a.)

During 1978,petitioner provided more than half of his stepsons' support.(See Stip.(8),App.A,infra,p,33a.) (The record shows 77% of their total support. It also shows that petitioner was the only person in the household who had any income or assets during 1978.)

Petitioner was neither a party to the divorce agreement or separation agreement between Judy(Stackel)Schneier-his wife in 1978-nor personally knew of his wife or her ex-husband prior to 1976; nor was aware of the terms of their divorce or separation agreement prior to the deficiency notice he received from the respondent in May,1981. (See Stip.(12)App.A,infra,p,34a)

2. On May 14, 1981, petitioner received



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a deficiency notice from respondent in the amount of $523 resulting from respondent's disallowance of the dependency exemptions for his two stepsons. Petitioner notified respondent that he had relied on his statutory and regulatory right and privilege to claim his stepsons as dependency exemptions,since he complied with all of the requirements of the aforesaid statutes and regulations. The respondent was adamant in his stand,basing his position on the fact that the father of the children had taken the children as his dependent exemptions in accordance with the law.

3. Petitioner filed a timely petition for a hearing in the United States Tax Court under 26 USCA 7442 which was granted. On April 4,1983, the hearing date,petitioner moved for a motion for summary judgment in accordance with FRCP Rule 56,together with supporting affidavits and documents showing there was no genuine issue as to any

material fact and,therefore,the petitioner was entitled to a judgment as a matter of law. The court instructed respondent to respond to the motion and scheduled the parties to appear in court on April 7,1983. On that date,the court suggested that the petitioner withdraw his motion for summary judgment since there were "no factual issues in the case; that (it was) strictly a question of law"; and that "there really (wasn't) any advantage to disposing of the motion for summary judgment." (quoted from transcript of court proceedings on April 7,1983.) After a conference in chambers, petitioner reluctantly agreed to withdraw his motion for summary judgment provided that all documents supporting the motion were made part of the record. The Court agreed to admit those documents as petitioner's memorandum and brief in support of petitioner's position.(quoting from transcript of proceedings on April 7,1983.)

4. Respondent and petitioner,before commencement of the proceedings,had entered into stipulation of the facts,(See App.A, infra,pp,31a-35a),which were made part of the record.

5. The Tax Court found for respondent [3] holding that "a spouse who files a joint tax return with a custodial spouse is bound by the provisions of (remedial) subsection 26 CFR 152(e)", [4] and that its holding "did not result in an arbitrary and capricious classification." (See App.A,infra, p.17a). Both the respondent and the Tax Court referred to the instant case as, "a case of first impression."(quote from trial transcript.)

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3. (See Appendix A,infra,p.p,14a-29a)
4. (See Appendix B,infra,p.p,3b-4b for relevant sections)
Subsection 152(e) provides, inter-alia, for divorced parents to agree between themselves who will claim the children as dependency exemptions.

The Tax Court rendered its final decision on July 6,1983 ordering petitioner to satisfy the $523.00 tax deficiency.[5/] 6. On April 12,1983,petitioner filed a timely notice of appeal from the Tax Court decision,which notice was entered by that court on April 15,1983. The United States Court of Appeals noted jurisdiction under 28 USCA 1291 and petitioner's opening brief was timely filed on September 23, 1983. In addition,petitioner filed a timely reply brief on December 12,1983,to respondent's delayed brief. Oral argument was scheduled and heard on June 6,1984. The Ninth Circuit Court of Appeals handed down its decision on June 15,1984 [6/] reviewing the tax court's legal conclusions de novo. (App.A,infra,p,2a.) It concluded that the tax court correctly upheld the Commissioner's disallowance of petitioner's dependent exemptions and deficiency

5. See Appendix A, p, 10a.
6. See Appendix A, pp,1a-10a.

assessment. (App.A,infra,p,9a-10a.

The main support for the Ninth Circuit's conclusion was Revenue Ruling 78-91 (1978-1CB36),[7/,8/] in which respondent makes it forever impossible for a stepfather to claim his stepchildren as dependency exemptions,[9/] even though he meets all of the statutory and regulatory requirements to do so,-if that stepfather happens to marry a divorced woman with children,which divorced woman previously agreed,in writing,to permit her former husband to claim the children as his dependency exemptions;even if the stepfather is neither aware of that agreement until he receives his deficiency notice from respondent,nor knew the parties at

7. See Appendix A,infra,pp,5(a)-7(a).
8. See Appendix B,infra, p,13b
9. Revenue Ruling 78-91,inter alia, mandates that all support provided by a stepfather shall be treated as coming from his wife,the mother of his stepchildren.

the time they signed their agreement. (See App.A, infra, p, 34a.)

Respondent, in effect, establishes a classification of stepfathers and then, in effect, repeals their statutory and regulatory right and privilege to take their stepchildren as dependent exemptions, even though they completely comply with the requirements Congress mandated.

In so deciding, the Ninth Circuit completely disregarded, and did not even refer to the legislative history of the remedial legislation in the Senate [10/] and House Reports, [11/] which expressly and unequivocally excludes from applicability of remedial subsection 26 USCA 152(e) all 'third persons' who provide more than half of a child's support during the

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10. Senate Report No. 488, (Finance Committee), Aug. 3, 1967 [To accompany H.R. 6056] (Pub. L. 90-78), 90th Cong.) 1st Sess. (1967) (See App.B, infra, pp, 14b-15b for relevant parts).
11. House Report No. 102, 90th Cong. 1st Sess. (1967) 1967-2C.B. 590-594 (See App.B, infra, p. 15 b for relevant parts.)

taxable year.[12] The Ninth Circuit also completely disregarded, and did not mention, Treasury Regulation 1.152-4(a) which excludes third persons who provide more than half of a dependent's support from being affected by remedial subsection 152(e). (See App. B, infra, p,10b.)

Additionally, in so deciding, the Ninth Circuit evaded the gravamen requirement of remedial subsection 152(e) and Treasury Regulation 1.152-4(a), i.e., that both the custodial and noncustodial parent must show that either, or both of them combined, have provided more than half of their children's support during the taxable year before the noncustodial spouse will be entitled to the benefits of remedial section 152(e)(2)(a).[13]

12. See Senate Report No.488, Part III, par.1 (App.B, infra, pp.14b-15b) See House Report No.102, Part III, par.1 (App.B, infra, p,15b.)
13. See App. B, infra, p,3b.

7. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc on June 25, 1984, which was denied by the Ninth Circuit on July 31, 1984.[14/] Petitioner then filed a timely motion for a stay of mandate pending timely application for writ of certiorari. The Ninth Circuit issued an order staying mandate on August 14,1984 for a period of 90 days from the date of the order,pending timely application for writ of certiorari within that time.[15/]

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14. See App. A, infra, p,11a-12a.

15. See App. A, infra, p,13a.

## REASONS FOR GRANTING PETITION

Although this Court has shown a reluctance to grant certiorari in federal tax cases in the absence of a clear conflict of decisions between the court of appeals for two circuits, it has, nevertheless made exceptions where the cause meets any of the following tests:

a.-where a showing is made that substantial numbers of taxpayers are affected.[1/]

b.-where there is a "clear-cut mistake of law" in the decision of the court below.[2/]

c.-where there are "questions of law, decision of which is unembarrassed by any disputed question of fact or any necessity to draw an inference of fact from basic findings."[3/]

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1/ See, e.g. United States v. Chicago, B & Q R. Co. 412 U.S. 401, 407 (1973)

2/ Dobson v. Commissioner, 320 U.S. 489, 502 (1943)

3/ Trust of Bingham v. Comm'r, 325, U.S. 365, 371 (1944)

d.-The Court has "frequently reexamined, as matters of law,determinations by (the courts below) of the meaning of the words of a statute as applied to facts found by (those courts.)" [4/]

e.-The Court has granted certiorari when the decisions of the courts below departs from or conflicts with the principles laid down in prior decisions of the Court. [5/]

ARGUMENT

Petitioner's cause meets all five of these tests:

a.-Countless numbers of stepfathers,similarly situated to the petitioner,are in danger of having their dependency exemptions disallowed for prior years, if the decision of the court of appeals is allowed to stand.

4/ Trust of Bingham v. Comm'r, 325 U.S. 365, 371(1944)

5/ See e.g., Trust of Bingham v.Comm'r, 325 U.S. 365,371(1944)

b.-In the instant case,the court of appeals has made a clear-cut mistake of law by denying petitioner a specific,unequivocal, vested statutory and regulatory right and privilege constitutionally granted by the Congress,which right and privilege have not been directly or indirectly repealed by the Congress as of December 31,1983,and have existed for more than half a century. Neither has Congress ever directly (or indirectly) made that right and privilege contingent upon any other person or section of the Internal Revenue Code.

c.-The court of appeals has stipulated that "there are no disputed issues of fact."[6/] The cause involves pure questions of law not related to any factual issues. All factual issues having any bearing on the questions of law have

6/ Opinion by Court of Appeals for the Ninth Circuit (See Appendix A,infra,p.3a)

been stipulated to by respondent.[7]

d.-The court of appeals has misinterpreted or disregarded words, or not given words their ordinary meaning in the legislative history,[8] the statutes,[9] and regulations[10] involved, and has attempted to "wrench meanings from the words which literally they do not bear."[11]

e.-The Court of Appeals for the Ninth Circuit has decided the federal questions of law involved in this cause in a way in conflict with 52 applicable decisions of the Supreme Court of the United

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7/ See Stipulations of Facts (App. A, infra, pp,31a-35a.)
8/ Senate Report No.488,Part III, 90th Congress 1967 (See App.B infra,pp,14b-15b. House Report No. 102, Part III, 90th Congress 1967 (See App. B, supra, p,15b.)
9/ 26USCA 151(a)(e)(1)(3),(See App.B, infra,p,1b) 26USCA 152(a)(2)or (9). (See App.B,infra, p,2b).
10/ 26CFR 1.151-1(a)(b),3(a) (See App.B, infra,p,8b); 26CRF 1.152-1(a)(2)(i)(b)( ) (See App.B,infra, pp,9b-10b).
11/ Crooks v. Harrelson, 282 U.S. 55,60 (1930).

States contained in (1) Petitioner's Brief in Support of Petitioner's Position which the United States Tax Court made part of the record and forwarded same to the Court of Appeals for the Ninth Circuit; (2) Petitioner's Opening Brief; (3) Petitioner's Reply Brief; and (4) Petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc. This Court has granted certiorari when a lower federal court disregards the principles laid down in prior Supreme Court decisions.[12/]

Respondent Commissioner, by virtue of his stipulations, concedes that petitioner meets all of the requirement of the aforementioned statutory and regulatory scheme to claim his stepchildren as dependency exemptions but that remedial section

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12/ Trust of Bingham v. Comm'r., 325 U.S. 365, 368-369 (1944)

152 (e)(2)(A) [13] authorizes their father to claim them as his dependents for 1978.

Respondent's self-serving response to petitioner's position that the legislative history of the remedial legislation [14] and Treasury Regulation 1.152-4(a) [15] excluded any "third person" from the applicability of the remedial legislation was that petitioner was not a "true third party." [16] Respondent, however, offered no evidence whatsoever to support that statement and the entire record is likewise barren.

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13/ See App. B, infra, pp, 3b. Subsection 152(e)(2)(A) authorizes the non-custodial spouse to claim his children as dependent deductions if he has a written agreement with his ex-wife to that effect and if he contributes at least $600 towards the support of each child during the calendar year. This subsection, however, is not triggered unless he or his wife, or both provide more than half of the children's support for the taxable year. (Subsection 152(e)(1)(A).

14/ See App. B. infra, Part III, 14b-15b and Part III, 15b.

15/ See App. B, infra, 10b.

16/ Trial Transcript, page 31.

The United States Tax Court's response to the 'third party' exclusion was that "while Congress did indicate that section 152(e) was not to apply where a "third party' contributes over one-half of the child's support,...there is no indication that Congress intended a "third party" to include a stepparent under the instant factual situation." 17/

The Tax Court paid mere lip service 18/ to Treasury Regulation 26 CFR 1.152-4(a) 19/ which is on point and restates the legislative history's exclusion of 'third persons' from the applicability of remedial section 152(e).

17/ App. A, infra, p.26(a)-27(a).
18/ See App. A, infra, 19a-20a
19/ See App. B, infra, p.10b
26CFR 1.152-4a states in relevant part:
Thus, section 152(e) and this section do not apply if a person other than the parents provides one-half or more for the support of such child during the calendar year.(emphasis added.)
The words "such child" refers to "Children of Divorced Parents,"which is part of the title of the legislative history of the Act.(See App.B,infra,p.15b.)

Petitioner believes that Congress' inclusion of the requirement in remedial subsection 152(e)(1)(A) [20] that either the non-custodial or the custodial spouse,or both, show that they provided more than half of the childrens' support before the non-custodial spouse can reach the benefits of subsection 152(e)(2)(A), [21] proves that Congress intended to continue the uniformity of the common requirement for all dependency deductions, i.e., that any person who claims a dependency exemption must provide more than half of the dependent's support during the taxable year. Additionally, the fact that Congress did not disturb the then existing statutory scheme giving stepfathers the right and privilege to take their stepchildren as dependent deductions if they meet all of the requirements,(which the respondent stipulated

20/ App. B, infra, p. 3b.
21/ See note 13, supra.

the petitioner did),is overpowering evidence of Congress' intention to include stepfathers as 'third persons' to be excluded from the applicability of remedial section 152(e).

Petitioner brings to the Court's attention that the Court of Appeals for the Ninth Circuit neither mentioned the 'third person' exclusion in the legislative history and in the Treasury Regulation, nor addressed the possible significance of that exclusion to the instant case. This glaring omission was pointed out to the Ninth Circuit by the petitioner in his Petition for Rehearing and Suggestion for Rehearing en Banc.

Petitioner pointed out all during the proceedings, and in his briefs and petition for rehearing, that the Tax Court had overruled the respondent Commissioner in a case involving a grandfather who had also been disallowed dependency exemptions for

his two grandchildren.[22] The respondent based his disallowance on the same ground as in the instant case, e.g., that there was a written agreement between the divorced parents (the ex-wife was the grandfather's daughter),permitting the non-custodial spouse to take the children as his dependency deductions.

Notwithstanding that agreement, the Tax Court ruled that the grandfather was a 'third person' excluded from the applicability of remedial section 152(e) enacted in 1967,since he had provided more than half of the grandchildren's support and that they had lived under his roof with their mother for more than half the calendar year.

A similar result denying the divorced mother[23] or the divorced father[24] dependency deductions was reached by the Tax

22/Nathaniel R.Winslow Jr.v.Commissioner 30 TCM 769 (1971-184)
23/Helen M.Lutter v.C.I.R.61TC685(1974)
24/Joseph R.Fisher v.C.I.R.Sec.78,492-PH,TC. (1978)

Court in cases involving the provision of more than half of the children's support by a state welfare agency. These two cases were also similarly placed on the record by the petitioner. All three cases were disregarded and not even mentioned by the Tax Court or the Ninth Circuit in their opinions.

These three cases,graphically demonstrate that the Tax Court recognizes that 'third persons' can be excluded from being affected by remedial section 152(e),if they provide more than half of the divorced children's support,irrespective of the claims of the father or the mother or any written agreement between them.

It begs common sense to suppose that Congress had grandparents and welfare agencies in mind when it excluded 'third persons' from the applicability of the remedial statute instead of the most obvious,numerous group of 'third persons',

i.e., stepfathers.

In an effort to explain to the Tax Court and the Court of Appeals for the Ninth Circuit the reason why Congress gave this narrow relief to the respondent in 1967,petitioner placed on the record 1982 statistics by the United States Bureau of Census which showed that 4,214,000 homes were headed by single parent,divorced women,up from 1,727,000 in 1970,an astounding increase of 2,487,000 homes headed by divorced women.

The respondent was aware of this growing pheonomenon in 1966 when he asked Congress for relief in curbing the number of anticipated tax cases between divorced parents.Congress granted the limited relief requested,e.g.,relief from cases between divorced parents,but not for cases between a divorced woman with children,who remarries and the new spouse stepfather can prove that he provides more than half of

his stepchildren's support,-as would any other person who claims a dependency exemption.

Congress,therefore,made it crystal clear in the legislative history,and by retaining the dependency exemption for stepchildren,that the relief it was granting only applied as between divorced parents and not to any other person who provided more than half of a child's support. The Secretary of the Treasury,likewise, adopted regulations to that effect.[25/]

This Court addressed this very issue of Congress' intent concerning a tax statute in New Colonial Ice Co. v. Helvering[26/] when it stated:

> Had there been a purpose,(by the Congress) to depart from the general policy...and to make the right to deduction transferable or available to others than the taxpayer...it is but reasonable to believe that purpose would have been clearly expressed. (Emphasis added.)

25/ CFR 26 Section 1.152-4(a)(see note 9,supra)
26/ 292 U.S. 435, 441 (1933)

Congress' silence in the legislative history, in not specifically excluding stepfathers from the class of 'third persons' who were not to be affected by the remedial legislation, is a deafening reaffirmation of stepfathers' dependency exemption rights and privileges. Both respondent and the Tax Court were required to give the words in Congress' stated exclusion of 'third persons' from applicability of remedial subsection 152(e) - their ordinary meaning. As this Court stated in Crane v. Commissioner.[27]

> [t]he words of statutes including revenue acts-should be interpreted where possible in their ordinary, everyday senses.

This Court went even further in laying down principles to apply to the construction of words in a statute in Old Colony R. Co. v. Commissioner[28] when it ordered:

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27/ 331 U.S. 1,6 (1946)
28/ 284 U.S. 552,560 (1931)

> If there were doubt as to the connotation of the term,and another meaning might be adopted,the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer. Gould v. Gould, 245 U.S. 151,153 (1917).

The Court has also repeatedly spoken out strongly against any "extension by implication beyond the clear import of the language used."[29/] The most quoted example, relative to a court's not sanctioning repeal by implication of a right or privilege, is contained in United States v. Borden Co.[30/] in which the Court stated:

> It is a cardinal principle of construction that repeals by implication are not favored...The manifest intention of the legislature to repeal must be clear and manifest.(Emphasis add.)

The Court of Appeals for the Ninth Circuit's interpretation of the legislative history of remedial section 152(e) perpetuates a myth created by the respondent and the United States Tax Court, in

29/ United States v. Merriam (263 U.S.179, 187-188(1923.)

30/ 308 U.S. 188, 189 (1939).

their effort to extend the applicability of the remedial section to cover persons other than divorced parents,despite the aforementioned unambiguous exclusion in the legislative history of any 'third person' from being affected by the Act; a similar exclusion in Treasury Regulation 1.152-4(a);[31/] and,most important of all, the retention of dependency exemptions for stepchildren by stepfathers in both the statutory and regulatory dependency scheme.

The myth created is that a 'divorced woman' retains,for tax purposes,that designation,even after she remarries and that her children remain 'children of divorced' parents.

The Internal Revenue Code does not recognize that aberration. For tax purposes,the Code considers a divorced woman who remarries to be the wife of her new spouse and her children to be his

31/ See Note 19, supra.

stepchildren. The Code permits the new spouse and his wife to file a joint tax return [32] and for the new spouse stepfather to take his stepchildren as dependent deductions. The applicable Treasury regulations do likewise.

What respondent;Tax Court;and the Ninth Circuit have done here is to try to "wrench a meaning" out of the legislative history to support their position:that Congress in section 152(e),intended to bind stepfathers to agreements previously entered into by the divorced parents.They intend to enforce such a result on the petitioner, even though he was not a party to, or benefeciary of, the agreement; had no knowledge of the agreement until he received a tax deficiency notice in May 1981 from respondent; nor knew the parties until five years after they had entered into their contractual arrangement.[33] Such a

32/ Section 6013(a),(see App.B,infra,p.4b)
33/ See Stipulation of Facts #12,App.A,infra, p.34a.

novel attempt runs counter to all statutory and common law principles of contract law.

This Court has indicated that it will not tolerate the witholding of tax benefits from a taxpayer, especially if the tax statute clearly and unequivocally gives the taxpayer the right to claim those benefits. In Lewyt Corp. v. Commissioner[34/] the Court stated on point:

> [w]here the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer. (emphasis added.)

Section 152(e) must be read and be construed in pari materia with sections 152(a)(e)(1)(3) and 152(a)(2)(9), if the courts are to support Congress' continued effort to achieve uniformity in the application and enforcement of the tax laws. This Court underscored the role the

34/ 349 U.S. 237, 240 (1954)

judiciary must play in helping Congress achieve its desired goal in Weinberger v. Hynson,Westcott & Dunning[35] when it stated:

> It is well-established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious,comprehensive meaning possible in light of legislative policy and purpose.(See also Helvering v. N.Y.Trust Co., 292 U.S. 455,464 (1933.)

The Court of Appeals for the Ninth Circuit did not follow the above instruction nor this Court's counsel that all courts apply and interpret the Internal Revenue Code uniformly. That principle was clearly expressed in U.S. v. Olympic Radio & T.V.[36]

> We can only take the Code as we find it and give it as great an internal symmetry and consistency as its words permit.

The Tax Court also,recognized that petitioner relied on "section 151(e) and 152(a)(2) when he claimed the dependency

35/ 412 U.S. 609,631-632 (1973).
36/ 349 U.S. 232,236 (1954)

exemptions for his stepsons in 1978. (Petitioner also relied on 152(a)(9) in the alternative. Respondent stipulated that petitioner's stepsons "were members of his household as defined in section 152(a)(9) in 1978," [37] which would in addition to section 152(a)(2), permit him to claim his stepchildren as dependency exemptions.)

The Tax Court, however, unconstitutionally deprived petitioner of his statutory and regulatory right and privilege by holding that because petitioner filed a joint tax return in 1978 with his wife, (the custodial spouse), he was "bound by the provisions of section 152(e)[38]." The Tax Court realized that it was establishing a new classification of taxpayers and denying them tax benefits, but expressed the belief that its action was "not arbitrary

37/ See App. A, infra, p. 33a.
38/ See App. A, infra, p. 29a.

and capricious."[39/]

When the Tax Court established a new classification of taxpayers, and then proceeded to deprive petitioner of his dependency deductions that Congress had granted for more than half a century-which rights and privileges it had not directly or indirectly repealed as of the date of the Tax Court's decision, it was not merely deciding a case; it was unconstitutionally encroaching on the Article I, Section 8(1) plenary taxing powers of the Congress. It is well-settled that no court has the constitutional authority to make tax law or deprive taxpayers of rights, privileges, and benefits that Congress has constitutionally granted.

In addition, the curious holding of the Tax Court impermissibly inflicted a penalty on the petitioner for filing a joint tax return. The Tax Court itself

39/ See App.A, infra, p.29a.

has stated that its "cases hold that the acceptance of the privilege of filing a joint return by married couples carries with it no denial of the individual rights under the statute,and that Congress has enacted no penalty for the privilege it has granted and the Commissioner may not enact one." [40/] (emphasis added.)

The Court of Appeals for the Ninth Circuit likewise noted that petitioner claimed dependent deductions for his stepsons for 1978 under the authority of sections 26 USCA 151(e) and 152(a).[41/] (The Ninth Circuit also did not refer to petitioner's alternate claim under section 152(a)(9) or that the respondent had recognized that claim in the Stipulation of Fact.)[42/]

The Court of Appeals for the Ninth

40/ Charles F. Fawsett v. C.I.R., 31 B.T.A. 139, 147 (1934).
41/ See App. A, infra, p. 3a-4a.
42/ See App. A, infra, p. 33a.

Circuit,evidently realizing that the respondent's and Tax Court's position contained a fatal flaw which neither of them had satisfactorily overcome,decided to review the case de novo.[43/]

The Tax Court had noted the threshold requirement of the remedial section 152(e) i.e., section 151(e)(1)(A),[44/] and Treasury Regulation 1.152-4(a).[45/]

The Tax Court,at first,tried to satisfy that requirement by reasoning which has been discredited by statute,treasury regulations and case law: e.g., that a husband could not take a deduction in his own right on a joint tax return. The Tax

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43/ See App.A, infra, p. 3a.
44/ See App.B, infra, p. 3b - Section 151 (e)(1)(A) requires the divorced parents to provide more than half of their children's support during the calendar year before the non-custodial divorced parent can reach the benefit in section 152(e)(2)(A) permitting him to take the children as dependent exemptions.
45/ See note 19

Court's use of Taft v. Helvering [46] and United States v. Allen, [47] was erroneous and misplaced. Petitioner cited decisions of this Court; the Ninth Circuit; other Circuits; and Tax Court decisions; as well as section 6013(d) [48] and Treasury Regulation 1.6013-4(b) [49] in opposition.

The Tax Court tried to overcome the respondent's stipulation that petitioner had provided over one-half of the children's support by indicating that his support came from community earnings. What the Tax Court evidently did not realize is that there is no division of community earnings until either separation, divorce, or death occurs. During the marriage,

46/ 311 U.S. 195 (1940).
47/ 551 F.2d 208 (8th Cir. 1977).
48/ See App. B, infra, p. 4b.
49/ See App. B, infra 12b-Section 1.6013-4(b): If a joint return is made, the gross income of husband and wife are computed in the aggregate basis...Although there are two tax payers on a joint return, there is only one taxable income. The tax on the joint return shall be computed on the aggregate income.

either spouse can spend his earnings as he/she sees fit. (Of course spousal support must be provided.) Also, the Tax Court ruled that state community property laws cannot be used to deny a federal taxpayer of rights and privileges Congress has bestowed on him. In Morgan v. Commissioner[50] the Court stated:

> [I]f it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what the name is given to the interest or right by state law. (emphasis added.)

The Court also reemphasized that position in Burnet v. Harmel.[51]

> Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control...(the will of the Congress) is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. (emphasis added.)

50/ 309 U.S. 78, 81 (1939)
51/ 287 U.S. 103, 110 (1932)

In a later case, Lyeth v. Hoey,[52] the Court declared on point:

> [T]he question as to the construction of the exemption in the federal statute is not determined by local law. (emphasis added.)

Petioner has quoted the above three cases relating to the community property issue,(there are many others),because the Court of Appeals for the Ninth Circuit stated in its conclusion that it had not reached the issue,"whether half the support provided by (petitioner) should be attributed to (petitioner's then wife) under California's community property laws."[53]

The Court of Appeals for the Ninth Circuit then attempted to surmount the fatal flaw by relying on Revenue Ruling 78-91[54] to support

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52/ 305 U.S. 188,193(1938)
53/ See App.A,infra,p.10a.
54/ (1978-1CB36) See App.B,infra,p.13b. Rev.Rul.78-91 states in relevant parts: The support furnished by the new spouse will be treated as furnished by the divorced (custodial) spouse for purposes of section 152(e)(1)in determining whether
(Footnote continues on next page)

its opinion, [55] notwithstanding the fact that this court has given little weight to the respondent's revenue rulings, especially if they did not carry out the Congressional intent or conflicted with the overall statutory and regulatory scheme.

The Court has stated that position consistently and without exception. In Commissioner v. Idaho Power Co. [56] the Court declared:

> (A revenue ruling) [i]s a legal opinion within the agency, not a Regulation or Treasury Decision. It is without force when it conflicts with an Act of Congress.

Here, Revenue Rule 78-91 conflicts with 26 USCA 151(a)(e)(1)(3) and 152(a)(2) or (9) and makes it forever impossible for petitioner, and stepfathers similarly situated, to claim their stepchildren as dependent deductions, even though they can prove that they provided more than half of

(Footnote from previous page): the divorced parents contributed over half of the children's support for the calendar year.

55/ See App.A, infra pp. 5a-7a.

56/ 418 U.S. 1, 22 (1973)

their support during the taxyear in question.

This Court has ruled that the Commissioner "goes beyond routine and exceeds his statutory power" when he promulgates a revenue ruling interpreting a Treasury regulation.[57] Revenue Ruling 78-91 conflicts with applicable Treasury Regulations.[58]

In Rowan Cos. v. United States the Court struck down a Treasury Regulation. (to which it traditionally gives much weight.) The Court held the regulation invalid because it "fail(ed)" to implement the Congressional mandate in a consistent and reasonable manner."[59]

In this case, Rev. Rul. 78-91 fails to implement in a reasonable manner the Congressional mandate in the legislative

57/ See e.g. Bartels v.Birmingham,332 U.S. 126-132(1946) and Social Security Bd.v. Nierotko, 327 U.S.358,369,370(1945)
58/ 26 CFR 1.151-1(a),2(a)(b),3(a); 1.152-1(a)(1),(2)(1),(b),(c);1.152-4a.
59/ 452 U.S. 247,253 (1980)

history of remedial section 152(e) to exclude 'third persons' from its applicability. To the contrary,Rev.Rul.78-91 frustrates the Congressional mandate and makes it impossible for 'third person' stepfathers,similarly situated to the petitioner,from enjoying the dependency exemptions granted by the Congress.

Revenue Ruling 78-91 does violence to the statutory and regulatory dependent exemption scheme and destroys the uniformity of the threshhold requirement for all taxpayers who claim dependent deductions, e.g., that the claimant must show he provided more than half of the dependent's support during the calendar year.

This Court has determined that "revenue rulings provide little aid in interpreting a tax statute. Helvering v. New York Trust Co., 292 U.S. 455,467-468(1933)."[60/]

60/ Biddle v. Commissioner, 302 U.S. 573,582 (1937).

Opposite to that determination is the Ninth Circuit's view that revenue rulings can "aid the court's interpretation of the dependency exemptions in the instant case by pointing out the trend of opinion among administrators familiar with tax laws."[61/]

The self-serving interests of the respondent Commissioner, to enable him to achieve an impermissible purpose for the sake of administrative convenience, does not commend him as an impartial, objective source of the "trend of opinion among administrators."

This Court has asserted that any regulation (or revenue ruling) which attempts to disallow a deduction is necessarily invalid.[62/]

Even the Tax Court has placed little reliance on revenue rulings. In Estate of

61/ App.A, infra, p, 6a

62/ See e.g., Trust of Bingham v. Comm'r 325 U.S.365, 377(1944)and cases cited therein.

Grace E. Lang,[63] that court stated:

> A revenue ruling,without more,of course is simply the contention of one of the parties to the litigation,and is entitled to no greater weight.

In note 4 of Lang, supra, the Tax Court goes on to declare:

> Revenue rulings,unilaterally issued by respondent (Commissioner) do not rise to the dignity of those "rules and regulations" which under the authority of sec.7805(e) are prescribed by respondent" with the approval of the Secretary. Sec. 301.7805-1(a),Proced.Admin.Regs.

Petitioner submits that Rev.Rul.78-91 was unilaterally issued by respondent and does not rise to the dignity of the Treasury regulations,with which it directly conflicts,and therefore should be considered null and void. (See e.g., Trust of Bingham, supra, page 40.)

The Tax Court in D.B.Anders[64] stated:

(a) revenue ruling is no more than

63/ 64 T.C. 404,406,47 (1975)
64/ 48 T.C. 815,821 (1967)

> the expression of the opinion or position of the Internal Revenue Service with respect to the law applicable to the facts recited therein and does not have the force of law.

Other Circuits prefer to rely on the statutes and not revenue rulings.[65/]

Petitioner has cited these cases to show the low rating and significance courts generally assign to revenue rulings. Yet the Court of Appeals for the Ninth Circuit would base its opinion largely on the strength of Revenue Ruling 78-91. Absent that revenue ruling, the opinion of the Ninth Circuit in the instant case would have very little, if any validity.

Petitioner contends that Rev.Rul. 78-91 is a thinly disguised attempt to circumvent and frustrate existing dependency deduction statutes and applicable

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65/ Stubbs, Overbeck v. United States 445 F.2d 1142 (5th Cir. 1971) Sims v. United States 252 F.2d 434, (4th Cir. 1958) affd. 359 U.S. 108 (1959) United States v. Bennett, 186 F.2d 407 (5th Cir. 1951) in which Chief Judge

(Footnote continued on next page)

regulations,as heretofore pointed out,as well as the intent of the Congress,as expressed in the legislative history of remedial section 152(e). It is a serious and unconstitutional encroachment on the Article I, Section 8(1) plenary taxing powers of the Congress. Rev.Rul.78-91,in effect,impermissibly establishes 2 classifications of stepfathers, e.g.:

(1) Stepfathers who have married divorced women with children,which divorced women have no written agreements with their ex-husbands permitting them to take the children as dependency exemptions. Such stepfathers can take their stepchildren as dependent deductions.

(2) Stepfathers who have married divorced

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(Footnote from previous page)
Hutcheson stated that a revenue ruling had "no more binding or legal force than the opinion of any other lawyer."

women with children who have such agreements. Such stepfathers,because of Rev.Rul.78-91,can never take their stepchildren as dependent deductions since Rev.Ruling 78-91, states that they have provided no support at all, whereas,in fact,they may have actually provide more than half of the support.

Petitioner believes that Rev. Rul. 78-91 unconstitutionally deprives him,and countless others similarly situated,of the property they have gained,(i.e.,tax benefits),in the good-faith exercise of a specific,unequivocal,vested right and privilege granted by the Congress in the exercise of its Article I Section 8(1) plenary taxing powers. Such an unwarranted deprivation of property appears to be a violation of petitioner's Fifth Amendment guarantee to due process and equal protection of the laws.

This Court addressed such a denial by a governmental agency of rights and benefits granted by the Congress to a class of citizens in Jiminez v. Weinberger 66/ by stating:

> [t]o conclusively deny one subclass benefits presumptively available to the other denies the former of the equal protection of the laws guaranteed by the due process provisions of the Fifth Amendment.

It should be remembered that it is not the Congress making these classifications,but a governmental agency. The petitioner is well-aware that tax benefits are a matter of legislative grace and not a right. However,petitioner maintains that only the Congress can repeal a right and privilege it has granted,and not the respondent Commissioner.

This Court has often admonished executive agencies not to encroach on the legislative powers of Congress. In

66/ 417 U.S. 628, 94 S.Ct.2496(1974)

Manhattan Gen. Equip.Co. v. Commissioner, 67/ this Court clearly laid down the principle to be followed by administrative agencies:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law-for no such power can be delegated by Congress...A regulation which does not do this,but operates to create a rule out of harmony with the statute is a mere nullity.

Petitioner asserts that Rev.Rul.78-91 is a rule "out of harmony" with the entire statutory and regulatory dependency exemption scheme,including remedial section 152(e) and prays that this Court will declare it to be a "nullity". This blatant attempt by the respondent to circumvent federal tax statutes and Treasury regulations through the stratagem of a revenue ruling should be dealt with in an appropriate manner.

67/ 297 U.S. 129,134 (1936)

Diligent research by petitioner,a third year law school student,has not revealed a similar example of an executive agency of the federal government attempting to thwart Congressional statutes and Treasury Regulations by the stratagem of a revenue ruling,-which establishes classifications of citizens, causing them to be deprived of property gained from the good-faith exercise of a clear and unambiguous,vested right and privilege,constitutionally granted by the Congress,and upon which they justifiably relied.

Petitioner prays that this honorable Court will respond to respondent's unconstitutional legislative act,as well as the sanctioning of that act by a United States Court of Appeals for the Ninth Circuit. The impact of the Ninth Circuit's decision in the instant case extends far beyond harm to the petitioner,and countless others similarly situated. Nor are

the harmful consequences of that court's decision confined to the tax area. If allowed to stand,the decision below will have a far-reaching impact in the conduct of all agency rulemaking proceedings under 5 USCA § 553.

In a subsequent case, Greene v. Mc Elroy, [68/] the court cautioned that:

> [w]ithout explicit action by lawmakers,decisions of Constitutional import and effect would be relegated by default to administrators,who, under our system of government are not endowed with authority to decide them.

The Opinion of the Court of Appeals for the Ninth Circuit in the instant cause must be judged as an attempt to provide a veneer of respectability to an obvious unconstitutional encroachment by the respondent on the Article I, Section 8(1)(18) taxing powers of the Congress.

When the Ninth Circuit upheld and sanctioned Revenue Ruling 78-91 it, in

68/ 360 U.S. 474,507 (1959).

effect,also usurped Congress' plenary power to lay and collect taxes thus grievously violating the Doctrine of Separation of Powers,so deeply ingrained in our political and judicial system.

The Court of Appeals for the Ninth Circuit has,by its decision,authorized the establishment of classifications of taxpayers resulting from respondent's promulgation and enforcement of Rev.Rul.78-91, and the deprivation of petitioner's,and numerous other taxpayers',property gained from availing themselves of tax benefits granted in the Internal Revenue Code.

Petitioner contends that Rev.Rul.78-91,is unconstitutional on its face and as applied to petitioner,and should have been struck down by the Court of Appeals for the Ninth Circuit,and the respondent Commissioner directed to the Congress for any relief he felt necessary and appropriate under the circumstances.

This Court has set the course for lower courts to follow when the respondent Commissioner seeks a federal court's assistance to accomplish a purpose which only the Congress can provide.

In United States v. Byrum [69] this Court declared on point:

> Courts properly have been reluctant to depart from interpretation of tax law which has been generally accepted when the departure could have far-reaching consequences. When a principle of taxation requires examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences. (emphasis added.)

The Court of Appeals for the Ninth Circuit demonstrated that it adhered to this Court's directive in Byrum, supra, when it stated in a recent case; C.I.R. v. Greenspun. [70]

> [w]hen a principle of taxation requires examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences. (emph.add.)

69/ 408 U.S. 125,135 (1972)
70/ 670 F.2d 123,126 (1982)

Petitioner believes it is reasonable to ask why the Ninth Circuit did not similarly direct respondent to the Congress in the instant cause? Certainly, the petitioner's clear and unambiguous vested right and privilege under the Internal Revenue Code merited such action by the Ninth Circuit-especially since Congress had never directly or indirectly repealed the long-standing dependency benefits. Certainly, there were "far-reaching consequences" involved here and Congress was better equipped than the court to modify a tax benefit that had been so deeply entrenched in the dependency exemption scheme. The court should not have taken it upon itself to sanction the establishment of a classification of taxpayers and to uphold the deprivation of benefits flowing from that classification.

If the Ninth Circuit's judicial action was taken for the administrative

convenience of the respondent,then it would have been in contravention of the following principles laid down by this Court in Frontiero v. Richardson: 71/

> [w]hen we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth,the mere recitation of which dictates constitutionality. Stanley v.Illinois. 72/

This Court also reflected in a case many years ago:

> Clearly,if the federal courts give way to the "seductive call of expediency"urged by administrators for the sake of administrative convenience,then surely the vital guarantees of our Constitution and rights and privileges granted by the Congress will be reduced to nothing more than a "form of words." 73/

It may be true that this case only involves $523.00 plus interest and is being litigated by only a pro se (albeit a third year law school student),but the issue involved is of paramount importance

71/ 411 U.S. 677, 690-691 (1972)
72/ 405 U.S. 645,656 (1972)
73/ See e.g. Silverthorne Lumber Co. v. United States, 251 U.S. 385,392 (1919).

because a federal court of appeals was being asked to decide whether an executive agency could make tax law,or decide tax benefits,or repeal of tax benefits.

Another dimension has been recently added to this cause,which indeed makes it a case of first impression. Finally,seventeen years after the enactment of remedial 152(e),the respondent Commissioner-no doubt fearing that petitioner would probably prevail in the instant case because his position was legally correct-decided to do what he should have done in the first instance: e.g.,go to the Congress for any assistance he deemed necessary and appropriate.

Congress,at the request of respondent Commissioner,has just enacted the Tax Reform Act of 1984,Public Law 98-369,effective January 1,1985.[74/] Section 423 of that Act, amends remedial section

74/ See App.B,infra,pp.5b-7b.

152(e). The new section 152(e)(5) provides what the Commissioner tried to unconstitutionally accomplish by the device of Rev. Rul.78-91 in 1978.[75/]

This new subparagraph conclusively proves the position that the petitioner has advanced throughout these proceedings: e.g.,that in 1978 he had a statutory and regulatory right and privilege to take his stepsons as dependent exemptions. Those rights and privileges have and will exist until January 1,1985. For the first time since 1967,when the remedial statute was enacted,Congress has seen fit to set up two classifications of stepfathers: e.g.,some who will be able to claim dependent exemptions for their stepchildren and countless others who will not. There

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75/ See App.B,infra p.7b
Section 152(e)(5) now provides:
(5)Special Rule For Support Received From New Spouse of Parent-For purposes of this subsection,in case of the remarriage of a parent,support of a child received from parent's spouse shall be treated as received from the parent.

can now be no doubt that the Opinion of the Court of Appeals for the Ninth Circuit was clearly erroneous and arbitrary and infringed on the plenary taxing powers of the Congress. Congress has once again demonstrated that the tax benefits it gives can only be rescinded by the Congress.

It should be readily apparent that a ruling by the Court before January 1,1985 is urgently needed to prevent the federal court system from being inundated with cases filed by millions of stepfathers who may suddenly receive deficiency notices from the respondent Commissioner for the past three years,when respondent attempts to enforce the new amendment retroactively.

As required by statute,the respondent must maximize tax collections in any manner he can. Whereas,in the past he has abided with both stepfathers and non-custodial spouses taking the same deductions, and only taking action when a noncustodial

spouse,still bitter against his ex-wife, reported his suspicion that the new spouse was also taking the benefit; or if a single non-custodial spouse reported children on his tax return and was examined as to the authenticity of the deduction-it can now be reasonably anticipated that the respondent Commissioner will utilize his new-found legal ability to the utmost. It must be assumed,judging from the past, that respondent will pursue this new found source of tax revenues with his characteristic vigor and enthusiasm.

To gain the maximum results, the respondent will have to enforce the new amendments retroactively. The retroactive application of tax amendments is a grey area in the law. Although the Court has taken the position in several cases against retrospective operation of tax laws or amendments,it has couched that position with qualifying language.

In the seminal case, Un.Pac.R.R. v. Laramie Stock Yards,[76] the Court stated:

> [t]he first rule of construction is that legislation must be considered as addressed to the future and not to the past...[a] retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (See also Greene v. United States, 376 U.S. 149, 160 (1963). (Emph. Added.)

In Claridge Apartments Co. v. Comm'r.[77] the Court stated:

> Retroactivity, even where permissible is not favored, except upon the clearest mandate. (emphasis added.)

However, in United States v. Estate of Donnelly[78] the Court declared:

> Deviant rulings by circuit courts of appeals, particularly in apparent dictum, cannot generally provide the "justified reliance" necessary to warrant witholding retroactive application of a decision construing a statute as Congress intended it.

76/ 231 U.S. 190, 199 (1913).
77/ 323 U.S. 141, 164 (1944).
78/ 397 U.S. 286, 295 (1969).

A further 'greying' of the retroactivity question occurs when seeking to interpret Bradley v. Richmond School Board. 79/ In that case the Court stated:

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary.

The Court went on to say in Bradley, supra:

> The second aspect of the Court's concern that injustice may arise from retrospective application of a change in law relates to the nature of the rights, effected by the change. The Court has refused to apply an intervening change to a pending action where it has concluded that to do so will infringe upon or deprive a person of a right that had matured or become unconditional; See Greene v. United States, 376 U.S. at 160; Claridge Apartments Co.v. Commissioner, 323 U.S.141,164(1955); Union Pacific R.Co. v. Laramie Stock Yards Co., 231 U.S. 190,199(1913) (Emph.Add.)

The respondent Commissioner will surely take the position that Congress has

79/ 416 U.S. 696, 711 (1973)

clearly indicated in the Section 423 amendment to section 152(e) that it intended it to be retroactive. On the other hand,millions of stepfathers will take the opposite position. It will be left for the federal judiciary to decide countless cases that will certainly arise on this very issue. Those courts will have to decide Congress' intention,since there appears to be no legislative history available on this particular section. (Petitioner called the staff of the Joint Conference Committee of the Senate Finance Committee and the House Ways and Means Committee,and the staff of House Ways and Means Committee. He was told by a staff member of both Committees that there was no legislative history on the Section 423 amendments.)

The federal courts will have to decide under different factual circumstances, in numerous cases,whether the retrospective

application of the Amendments would "result in a manifest injustice." 80/

Petitioner respectfully suggests that the arguments in his petition for writ of certiorari conclusively prove that neither the respondent Commissioner nor the Court of Appeals for the Ninth Circuit have a constitutional right to legislate classifications of taxpayers and then proceed to deprive them,and him,of a specific and unequivocal,vested right and privilege, constitutionally granted by the Congress, especially when applicable Treasury regulations clearly and unambiguously define that right and privilege.

Petitioner additionally suggests that the information now supplied to this Court clearly demonstrates that the Court of Appeals for the Ninth Circuit decided the pure federal question of law in this case in a way in conflict with applicable

80/ Bradley v.Richmond School Board 416 U.S. 695,711(1973).

decisions of the Supreme Court. The cases cited in this petition,(and many more), were the same cases that were placed on the record and made available to the Ninth Circuit, except for the cases on retroactivity.

Finally, petitioner submits that the federal judiciary and the executive branch of the federal government are responsible for ensuring that constitutional and statutory rights, constitutionally granted, are respected. This has not been done by the respondent Commissioner or the Court of Appeals for the Ninth Circuit in this case. Not only have they not respected those rights, they have unconstitutionally taken them away from petitioner.

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## CONCLUSION

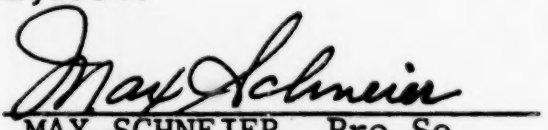
Petitioner respectfully submits that in view of the importance and simplicity of the questions presented;the lack of any doubt as to the purpose and the intent of the Congress when it enacted remedial section 152(e) in 1967;and the urgency of an early decision in order to avoid a multitude of similar lawsuits on the questions now presented,the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals for the Ninth Circuit be forthwith reversed,with instructions for such further proceedings as may be necessary,consistent with interpretation of applicable statutes and regulations which grant stepfathers the right and privilege to claim their stepchildren as dependency exemptions.

If,however,this petition should be granted but the Court should determine that oral argument is required,it is

respectfully requested that the cause be placed on the Summary Docket and advanced for argument before January 1,1985 and, that in the interest of the earliest possible hearing,this petition be accepted as the brief of petitioner on the merits.

Respectfully submitted,

DATED: October 22,1984.



MAX SCHNEIER, Pro Se
4150 Via Dolce # 224
Marina del Rey, Ca.90292
(213) 823-7473

APPENDIX A

OPINIONS, DECISIONS, ORDERS AND

STIPULATIONS OF FACTS BELOW

FOR PUBLICATION

FILED

JUN 15 1984

PHILLIP B.WINBERRY

CLERK,U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| MAX SCHNEIER, Petitioner-Appellant, | ) | |
| vs. | ) | No. 83-7533 |
| COMMISSIONER OF INTERNAL REVENUE, | ) | Tax Court No. 8277-82 |
| Respondent-Appellee. | ) | OPINION |

Argued & Submitted: June 6, 1984

Appeal from a Judgment of the Tax Court

Before: WRIGHT,FERGUSON,and REINHARDT, Circuit Judges.WRIGHT,Circuit Judge:

We consider here whether 26 U.S.C. § 152(e)(2)(A) prevents a stepfather from claiming dependent exemptions for his stepchildren even though he provided over half their support. The tax court upheld the Commissioner's determination that the natural father was entitled to the exemptions pursuant to a divorce decree under which he made the required support payments.

FACTS

Prior to 1978, Judy Schneier divorced her first husband, Stephen Stackel. The separation agreement provided that, if Stackel made the required support payments, he could claim dependent exemptions for their two children. During 1978, Stackel paid $5,600 for child support. He claimed the exemptions for both children for that year.

In 1978 Judy Schneier was married to appellant, Mr. Schneier. Her children lived with them during that year, and Schneier

provided more than half of the children's support. Schneier also claimed exemptions for the children on the marital community's joint 1978 return.

The Commissioner disallowed the Schneiers' dependent exemptions and assessed a deficiency of $523. Only Mr. Schneier filed a petition for redetermination in tax court, apparently because he and Mrs. Schneier were separated or divorced when the Commissioner assessed the deficiency determination, and Schneier appealed.

ANALYSIS

This case requires us to interpret the dependency exemption provisions of the Internal Revenue Code, 26 U.S.C. §§ 151-152. There are no disputed issues of fact. We review the tax court's legal conclusions de novo. Confederated Tribes v. Kurtz, 691 F.2d 878, 880 (9th Cir. 1982), cert. denied, 103 S.Ct. 1433 (1983).

Section § 151(e) provides an exemption for each of a taxpayer's dependents. For purposes of this section, a taxpayer must provide over half the support of any dependent during the calendar year in order to claim the exemption. 26 U.S.C. § 152(a).

Section 152(e) provides special rules for determining who provided support for a child of divorced parents. The noncustodial parent may claim an exemption for a child if: (1) the divorce decree or a written agreement so provides; and (2) the noncustodial parent pays at least $600 in support for that child during the year. Id. at (e)(2)(A). Section 152(e) applies only if the child's parents separately or jointly provide over half of his or her support. § 152(e)(1)(A).

Here, the IRS and the tax court determined that Stackel, not Schneier, was entitled to claim exemptions for the children. Schneier contends that section 152(e)

was incorrectly applied because he, not the children's natural parents,provided over half the children's support in 1978.

Neither section 152(e)nor the accompanying regulations discusses whether a stepparent's support is attributed to his or her spouse,who is a natural parent,for purposes of determining whether parents provide more than half of a child's support. No court has squarely addressed the issue.

The Commissioner has determined that child support furnished by a stepparent is attributable to the parent-spouse for purposes of section 152(e). Rev.Rul.78-91, 1978-1 C.B. 36. Under this interpretation, section 152(e) applies when parents and their new spouses furnish over half of a child's support, even though a stepparent actually furnished more than half of the child's support. Id.

The 1978 revenue ruling reversed an

earlier ruling,Rev.Rul.71-19,1971-1 C.B. 43,which adopted Schneier's position. The Commissioner had already revoked the earlier ruling and had held that the stepparent's support would be attributed to the spouse for the purpose of meeting the section 152(e)(2)(B) support requirement.Rev.Rul. 73-175,1973-1 C.B. 58.

Because the Commissioner promulgated Rev.Rul. 78-91 before Schneier filed his return, Rev.Rul.78-91 governed Schneier's 1978 exemptions. See also 26 U.S.C. § 7805 (b); Manocchio v. Commissioner, 710 F.2d 1400,1403 (9th Cir.1983) (revenue rulings presumed retroactive unless Commissioner specifically states otherwise).

Revenue rulings do not have the force of law. Confederated Tribes v. Kurtz,691 F.2d at 881 n.2.They aid our interpretation of the dependency provisions,however, by pointing out "the trend of opinion among administrators familiar with the tax laws."

Id.

We agree with the Commissioner's holding in Rev.Rul. 78-91. Congress enacted section 152(e) in 1967 to remedy problems existing with the prior system,which awarded an exemption for a child to the parent who could prove that he or she provided more than half of the child's support. See S. Rep. No. 488, 90th Cong., 1st.Sess. 2-3, reprinted in 1967 U.S. Code Cong. & Ad. News 1527,1528-30.

Congress noted that the old scheme created difficult problems of proof,often made the IRS an arbiter between angry divorced parents, and unduly clogged administrative machinery with many cases involving small amounts of money. To permit stepparents to circumvent section 152(e) by proving that they, not the parents,provided over half the children's support would resurrect the problems that led Congress to enact section 152(e).

"An interpretation so completely at variance with the declared legislative purpose should not be adopted unless required by the plain terms of the statute." Colton v. Commissioner, 56 T.C. 471, 475 (1971).

Moreover, Congress enacted section 152 (e)(2)(A) so that state courts could take the dependent exemptions into account when making financial arrangements between divorcing parents. See S. Rep. No. 488, supra, at 3-4. See generally Boucher v. Commissioner,710 F.2d 507,512 (9th Cir. 1983) (parties have great freedom to determine tax consequences of divorce). This purpose would be frustrated by permitting a parent's new spouse to claim the exemption.

One child may in a few instances produce more than one exemption. See 26 U.S.C. § 151(e)(2) (married child filing separately may be claimed as dependent and

may claim personal exemption);Martino v. Commissioner, 71 T.C. 456,464(1978) (same is true if married child files joint return solely to obtain refund); 26 C.F.R. § 1.152-1(c)(student child may be claimed as dependent and may claim personal exemption).

Our situation is not analogous. In none of the instances in which a single child produces two exemptions does that child produce two dependent exemptions. Moreover,if the parents had not been divorced,only one exemption could be claimed for each child. See 26 U.S.C.§ 151(e). Congress has not manifested an intent to permit more than one dependent exemption to be claimed for a child simply because his or her parents are divorced.

CONCLUSION

The tax court correctly upheld the Commissioner's disallowance of Schneier's

dependent exemptions and deficiency assessment.

Because of our holding, we do not reach the issue whether half the support provided by Schneier should be attributed to Judy Schneier under California's community property laws.

We have reviewed Schneier's constitutional arguments and find them without merit.

AFFIRMED.

FILED

JUL 31 1984

PHILLIP B.WINBERRY

CLERK,U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| MAX SCHNEIER,<br>Petitioner-Appellant,<br>vs.<br>COMMISSIONER OF<br>INTERNAL REVENUE,<br>Respondent-Appellee. | No. 83-7533<br>Tax Court No.<br>8277-82<br>ORDER |

Before: WRIGHT,FERGUSON,and REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing,and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing,and no judge of the court has requested a vote

on it. Fed R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED

AUG 14 1984

PHILLIP B.WINBERRY

CLERK,U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| MAX SCHNEIER, Petitioner-Appellant, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee. | ) | No. 83-7533 Tax Ct. # 8277-82 ORDER STAYING MANDATE |

Before: WRIGHT, Circuit Judge.

The appellant's motion is granted. The issuance of mandate will be stayed for 90 days from the date of filing of this order,pending timely application for writ of certiorari within that time.

SERVED JUL 5 1983

T.C. MEMO. 1983-390

UNITED STATES TAX COURT

MAX SCHNEIER, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 8277-82. Filed July 5,1983.

Max Schneier, Pro se.

Darren M. Larsen, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

DAWSON, Judge: This case was assigned to and heard by Special Trial Judge Darrell D. Hallett pursuant to the provisions of section 7456(c) of the Internal Revenue Code [1] and Rules 180 and 181,Tax Court Rules of Practice and Procedure. [2] The

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1 All section references are to the Internal Revenue Code of 1954,as amended,unless otherwise indicated.

2 Pursuant to the order of assignment,on the authority of the "otherwise provided" language of Rule 182, Tax Court Rules of Practice and Procedure,the post-trial procedures set forth in that rule are not applicable in this case.

Court agrees with and adopts his opinion which is set forth below.

OPINION OF THE SPECIAL TRIAL JUDGE

HALLETT, Special Trial Judge: Respondent determined a deficiency in petitioner's 1978 Federal income tax in the amount of $523. The issue for decision is whether a mother and stepfather having custody of children by the mother's former marriage may claim dependency exemptions on their joint return for the children where more than one-half of the support is provided from earnings of the stepfather but the noncustodial father contributed more than $600 support and the separation agreement between the noncustodial father and mother provided that the noncustodial father would be entitled to the exemptions.

Most of the relevant facts have been stipulated and are found accordingly.

Petitioner was a resident of Marina Del Ray, California, at the time the

petition was filed in this case.

During the tax year 1978 petitioner and Judy Schneier were married and had custody of two children of Judy Schneier from her former marriage with Mr.Stackel. The separation agreement entered into between Mr.Stackel and Mrs.Schneier incident to their divorce provided that Mr. Stackel would be entitled to dependency exemptions for the two children provided he made the $400 monthly support payments required by the agreement. During 1978, Mr.Stackel complied with the terms of the separation agreement concerning support and he made payments amounting to $5,600 for the support of the two children.

The amount of support provided by the petitioner for the two children during 1978 was more than one-half of their total support for the year.

Petitioner was not a party to the divorce or the separation agreement between Mr.Stackel and Mrs.Schneier, and he

did not know of the terms of their divorce or separation agreement prior to May 1981.

On their joint Federal income tax return for the year 1978, petitioner and Mrs. Schneier claimed dependency exemptions for the two children. Mr.Stackel claimed exemptions on his 1978 return for the two children as well. Respondent determined that Mr.Stackel is,and petitioner and Judy Schneier are not, entitle to the exemptions claimed.[3] We agree with respondent.

Petitioner relies upon the provisions of section 151(e) and section 152(a)(2) in support of his claim to entitlement for the exemptions. These sections permit an exemption for a stepchild of the taxpayer if the taxpayer contributes over one-half of the stepchild's support. Since it

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[3] Although the notice of deficiency in this case,because it relates to the joint return filed by petitioner and Judy Schneier,was issued to the two of them, only petitioner filed a petition in response to the notice.

has been stipulated that over one-half of the support for the two children involved here was received from petitioner, and since there is no dispute that the children were his stepchildren during the taxable year 1978, petitioner contends that he meets all of the requirements of the statutes. However, respondent relies upon section 152(e) for the position that for purposes of section 152(a), Mr. Stackel is to be treated as if he contributed over one-half of the children's support such that he, and not petitioner, is entitled to the exemptions.

Section 152(e)(1) provides that if a "child" receives over one-half of his support from his divorced or legally separated "parents" and the child is in the custody of one or more of his parents for more than one-half of the year, then, unless section 152(e)(2) applies, the child shall be treated as having received

over one-half of his support from the parent having custody the greater portion of the year. Section 152(e)(2) provides that the child referred to in section 152(e)(1) shall be treated as having received over one-half of his support from the parent not having custody if a divorce decree or a written agreement provides that the noncustodial parent shall be entitled to the exemption,and that parent provides at least $600 support for the child during the year.

Respondent argues that because the separation agreement between Mr.Stackel and Mrs.Schneier provided that Mr.Stackel was to have the benefit of the dependency exemptions for the two children,and Mr. Stackel paid more than $600 support for them,he,and not petitioner,is entitled to the exemptions.

A threshold requirement for the applicability of the special rules provided

by section 152(e) in the case of divorced parents is that the parents must provide over one-half of the child's support. Thus,if more than one-half of the support is provided by a third party,section 152 (e) has no applicability and the general rules of section 151 and section 152 determine whether a taxpayer is entitled to the exemption. Hopkins v. Commissioner, 55 T.C. 538, 540-541 (1970);section 1.152-4(a), Income Tax Regs. Petitioner contends that we should consider the exemptions for his two stepsons as having been claimed by him as a "third party" not precluded under section 152(e)(2) from doing so by the separation agreement involving Mr. Stackel and Mrs. Schneier.

However,in the first instance,petitioner overlooks the fact that it is not he, as an individual taxpaying unit separate and distinct from Mrs.Schnier, who claimed the exemptions on the return in question.

Rather,the exemptions were claimed on a joint return filed by petitioner and Mrs. Schneier. It has long been held that in come and deductions reported on a joint return are to be treated as having been reported by husband and wife together filing as a single taxable unit. Taft v. Helvering, 311 U.S.195 (1940); United States v. Allen, 551 F. 2d 208 (8th Cir. 1977).

Thus, petitioner cannot so conveniently frame the dependency exemption question in terms of his relationship to the children and the amount of support that he provided for them. The exemptions in issue were claimed by a single taxpaying unit of which Mrs.Schneier was as much a part as petitioner. Viewing the situation in this light, we conclude that the provisions of section 152(e) prohibit petitioner and Mrs.Schneier from claiming the exemptions on the joint return they filed.

Admittedly, section 152(e) is not clear on its face as to its applicability to the precise situation involved in this case. The "special rule" of section 152(e)(2) which allows the exemption to the non-custodial spouse applies to the "child" of "parents" described in section 152(e)(1). Section 152(e)(1) applies if a "child" (as defined in section 151(e)(3)) receives over one-half of his support during the year "from his parents who are divorced or legally separated***." On the one hand, a stepfather would appear to be included within the scope of section 152(e)(1), since that section refers to section 151(e)(3) for the definition of the term "child," and section 151(e)(3) defines a "child" to include a stepson or stepdaughter of a taxpayer. However, the "child" referred to in section 152(e)(1) is further described in that section as an individual receiving over one-half of

his support from his parents "who are legally separated or divorced." Arguably, the description of persons included as "parents" would exclude a stepfather who is not a party to the divorce proceedings and who provided over one-half of the support for the child.

However, we think section 152(e)(1) and (2) should be interpreted to preclude a natural parent and her spouse filing a joint return from claiming the exemption for a child where the non-custodial parent is otherwise entitled to the exemption under section 152(e)(2).[4] In this situation, the single taxable unit

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[4] Respondent reached the same conclusion in Rev. Rul. 78-91,1978-1 C.B. 36. Generally, revenue rulings are not entitled to the weight of Treasury Regulations,and will be set aside if they amount to an unreasonable construction of the statute involved. Estate of Lang v. Commissioner, 64 T.C. 404, 407 (1975), affd. in part and reversed in part, 613 F.2d 770 (9th Cir. 1980).

comprised of the natural parent and her spouse filing the joint return should be considered "parents" bound by the provisions of section 152(e).[5]

In reaching this conclusion,we are particularly mindful of the legislative purpose behind the enactment of the special provisions of section 152(e). In this respect,before the section was enacted,considerable controversy and uncertainty was generated over the issues as to the total support provided by each parent. To alleviate that situation,Congress provided,with the enactment of section 152(e), that the parents could decide and agree at the time of their divorce who was to have the dependency exemptions, and that their straightforward agreement on the matter would control for tax purposes.

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[5] We have reached no conclusion as to the result in this case if petitioner had filed a separate return.

See Colton v. Commissioner, 56 T.C. 471, 473-474 (1971); Sheeley v. Commissioner, 59 T.C.531,534 (1973). In light of this legislative purpose,we concluded in Colton that the noncustodial parent was entitled to dependency exemptions and his ex-wife was not even though the noncustodial parent's support contribution could be viewed as having been derived from community earnings of him and his new spouse such that his "individual" contribution, if community property rules were applicable in interpreting section 152(e), would be less than the $600 minimum required by the statute. We stated in Colton v. Commissioner, supra at 475:

*** [The application of community property laws] would introduce a whole new set of complexities - the necessity for distinguishing community from separate property - and would thus frustrate the congressional quest for simplicity and certainty. An interpretation so completely at variance with a declared legislative purpose should not be adopted unless required by the plain terms of the

statute. [Citations omitted].

Likewise,the interpretation of thes statute sought by petitioner in this case would clearly frustrate congressional intent. It would involve the necessity for tracing the relative contribution to the support of a child made by the custodial parent and the spouse of that parent to determine whether the noncustodial parent otherwise entitled to the exemption by reason of his agreement with the custodial parent is so entitled.[6] While Congress did indicate that section 152(e) was not to apply where a "third party" contributes

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[6] For example,although respondent stipulated in this case that petitioner provided over one-half of the children's support,it appears that the support provided came from community earnings of petitioner and Mrs.Schneier, While petitioner relies upon Colton v.Commissioner, 56 T.C.472,473-474(1971),for the notion that community property rules should be disregarded in determining his support contribution,if petitioner,unlike the petitioner in Colton,were to be treated as true "third party" having no obligation to support the children,his argument that one-half of the support derived from "his" earnings should not be attributed to Mrs. Schneier is of doubtful merit.

over one-half of the child's support (see H. Rept. No. 102, 90th Cong., 1st Sess.1 (1967), 1967-2 C.B. 590-594; S. Rept. No. 488, to accompany H.R. 6056 (Pub. L.90-78), 90th Cong., 1st Sess.(1967), reprinted in 1967 U.S. Code Cong. & Adm.News, 1527, 1529), there is no indication that Congress intended a "third party" to include a stepparent under the instant factual situation. Moreover,we think it was clearly foreseeable by Congress that divorced spouses reaching agreement as to the matter of exemptions would remarry,and it is unreasonable to conclude that Congress intended that the certainty which it otherwise sought to provide by the statute would be completely upset by remarriage of the custodial spouse.[7] See

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[7] See Reynolds v. Commissioner, T.C. Memo. 1980-6; O'Brien v. Commissioner, T.C. Memo. 1975-329.

footnote 5, supra.

Finally, we reject petitioner's various constitutional arguments that our interpretation of section 152(e),which denies petitioner the benefit of exemptions for the two children because of an agreement to which petitioner was not a party,is invalid. Again,petitioner conveniently overlooks the fact that he elected to file a joint return with his spouse,and by doing so presumably obtained the benefits of joint return rates. He now seeks to cast the exemption question in terms of whether "he",individually, has been deprived of entitlement to the exemptions which were in fact claimed on a joint return. In any event,deductions, including dependency exemptions,are matters of legislative grace which Congress has been given great leeway in conditioning,limiting,and denying. Labay v. Commissioner, 55 T.C. 6, 14 (1970), affd.

450 F.2d 280 (5th Cir.1971). Particularly in view of the congressional purpose to inject certainty into an area of law that was fraught with controversy,we do not believe our holding that a spouse who files a joint return with a custodial spouse is bound by the provisions of section 152(e) results in an arbitrary and capricious classification.

Decision will be entered for the respondent.

UNITED STATES TAX COURT

WASHINGTON, D. C. 20217

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|---|---|---|
| MAX SCHNEIER, Petitioner | ) | |
| v. | ) | Docket No. 8277-82 |
| COMMISSIONER OF INTERNAL REVENUE, Respondent. | ) | |

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion T.C. Memo. 1983-390 filed on July 5, 1983, it is

ORDERED AND DECIDED: That there is a Federal income tax deficiency due from petitioner for the year 1978 in the amount of $523.00.

(signed) Howard A. Dawson, Jr.
Chief Judge

Entered: JUL 6 1983

Form 50
Rev. Apr. 1970

UNITED STATES TAX COURT

| | | |
|---|---|---|
| MAX SCHNEIER, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Docket No.8277-82 |
| | ) | |
| COMMISSIONER OF | ) | |
| | ) | |
| INTERNAL REVENUE, | ) | |
| | ) | |
| Respondent. | ) | |

STIPULATION OF FACTS

In accordance with Tax Court Rule 91(e), the below-signed parties agree to this stipulation of facts pursuant to the general terms of this preable, unless specifically expressed otherwise in this stipulation. All stipulated facts shall be considered authentic. All copies shall be treated as if originals. Any relevancy objection may be made with respect to all or any part of this stipulation at the time of submission, but all other evidentiary objections are waived unless specifically expressed within this stipulation.

1. Petitioner Max Schneier's legal

residence is now,and was at the date of the filing of the petition herein,4150 Via Dolce, # 224, Marinal del Rey, California 90291.

2. Attached hereto as Joint Exhibit 1-A is a copy of the federal income tax return of the petitioner for the taxable year 1978.

3. Attached hereto as Joint Exhibit 2-B is a complete copy of the statutory notice of deficiency upon which notice this case is based.

4. The sole issue in this case is whether petitioner is entitled to claim dependency exemptions for his two step-children for whom he contributed over 50% of their support,during 1978,in light of the fact that petitioner's wife's former husband claimed the exemptions pursuant to their written separation agreement.

5. Max Schneier and Judy (Stackel) Schneier were legally married during

the year of 1978.

6. Dean Stackel aged 14,and Gregory Stackel, aged 11, were the natural children of Judy (Stackel) Schneier.

7. Judy Schneier and Dean and Gregory Stackel resided with Max Schneier for almost the entire year of 1978 at 1436 Capri Drive, Pacific Palisades,CA 90272; and that Dean and Gregory were members of my household as defined in Section 152(a)(9) in that year.

8. The amount of support provided by Max Schneier for Dean and Gregory Stackel during 1978 was more than half of their total support for that year.

9. Attached hereto as Joint Exhibit 3-C is a copy of the pertinent portions of the separation agreement entered into in 1972 by Judy Schneier and her former husband, Stephen Stackel.

10. Stephen Stackel complied with the terms of the agreement by paying child

support throughout 1978. The total amount of support provided by Stephen Stackel for his sons Dean & Gregory Stackel during 1978 was approximately between $5,000.00 to $6,000.00.

11. Stepehn Stackel claimed Dean and Gregory Stackel as dependents on his 1978 tax return.

12. Max Schneier is not a party to the divorce or separation agreement between Judy (Stackel) Schneier and Stephen Stackel. Max Schneier did not know personally,or know of Stephen Stackel or Judy Stackel prior to 1976 and was not aware of the terms of the divorce or separation agreement prior to the letter he received from the I.R.S.on May 14,1981.

KENNETH W.GIDEON
Chief Counsel
Internal Revenue Service

By: (Signed) Joseph O. Greaves
JOSEPH O. GREAVES
District Counsel
300 No. Los Angeles St,
P.O. Box 2031, Main P.O.
Los Angeles, CA 90053
Tel. No. (213) 688-6311

Date: April 4, 1983

(signed) Max Schneier
Max Schneier
Petitioner

Date: April 4, 1983

## APPENDIX B

## FEDERAL STATUTES INVOLVED

(Relevant Parts)

### 26 USCA 151

Part V—Deductions For Personal Exemptions

Sec.
151. Allowance of deductions for personal exemptions
152. Dependent defined.

§ 151. Allowance of deductions for personal exemptions

(a) Allowance of deductions.—In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.

e) Additional exemption for dependents.—

(1) In general.—An exemption of $1,000 for each dependent (as defined in section 152)—

(A) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than $1,000, or

(B) who is a child of the taxpayer and who (i) has not attained the age of 19 at the close of the calendar year in which the taxable year of the taxpayer begins, or (ii) is a student.

(3) Child defined.—For purposes of paragraph (1)(B), the term "child" means an individual who (within the meaning of section 152) is a son, stepson, daughter, or stepdaughter of the taxpayer.

26 USCA 152

§ 152. Dependent defined

(a) General definition.—For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendant of either,

(2) A stepson or stepdaughter of the taxpayer,

(3) A brother, sister, stepbrother, or stepsister of the taxpayer,

(4) The father or mother of the taxpayer, or an ancestor of either,

(5) A stepfather or stepmother of the taxpayer,

(6) A son or daughter of a brother or sister of the taxpayer,

(7) A brother or sister of the father or mother of the taxpayer,

(8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer, or

(9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 143, of the taxpayer) who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household.

(b) Rules relating to general definition.—For purposes of this section—

(3) The term "dependent" does not include any individual who is not a citizen or national of the United States.

(5) An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer

the relationship between such individual and the taxpayer is in violation of local law

(e) Support test in case of child of divorced parents,etc.—

(1) General rule.—If—

(A) a child (as defined in section 151(e)(3)) receives over half of his support during the calendar year from his parents who are divorced or legally separated under a written separation agreement,and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,such child shall be treated, for the purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year unless he is treated,under the provisions of paragraph (2),as having received over half of his support for such year from the other parent (referred to in this subsection as the parent not having custody).

(2) Special rule.—The child of parents described in paragraph (1) shall be treated as having received over half of his support during the calendar year from the parent not having custody if—

(A)(i) the decree of divorce or of separate maintenance,or a written agreement between the parents applicable to the taxable year beginning in such calendar year,provides that the parent not having custody shall be entitled to any deduction allowable under section 151 for such child, and

26 USC 152 (cont.)

(ii) such parent not having custody provides at least $600 for the support of such child during the calendar year, or

(5) Regulations.—The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subsection.

26 USCA 6013

26 § 6013 Joint returns of income tax by husband and wife

(a) Joint returns.—A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions, except as provided below:

(d) Special rules.--For purposes of this section—

(3) if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

(e) (2) Special rules.—

(A) the determination of the spouse to who items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws ...

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TAX REFORM ACT OF 1984
PUBLIC LAW 98-369
(effective January 1,1985)

Sec. 423. DEPENDENCY EXEMPTION IN THE CASE OF CHILD OF DIVORCED PARENTS, ETC.

(a) GENERAL RULE.—Subsection (e) of section 152 (relating to support test in case of child of divorced parents,etc.) is amended to read as follows:

"(c) SUPPORT TEST IN CASE OF CHILD OF DIVORCED PARENTS, ETC.—

"(1) CUSTODIAL PARENT GETS EXEMPTION.—Except as otherwise provided in this subsection,if—

"(A) a child (as defined in section 151 (e)(3)receives over half of his support during the calendar year from his parents—

"(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

"(ii) who are separated under a written separation agreement, or

"(iii) who live apart at all times during the last 6 months of the calendar year, and

"(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,such child shall be treated,for purposes of subsection (a),as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year (hereinafter in this subsection referred to as the 'custodial parent').

"(2) EXCEPTION WHERE CUSTODIAL PARENT RELEASES CLAIM TO EXEMPTION FOR THE YEAR.—A child of parents described in paragraph (1) shall be treated as having received

over half of his support during a calendar year from the noncustodial parent if—

"(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

"(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

For purposes of this subsection, the term 'noncustodial parent' means the parent w who is not the custodial parent.

"(3) EXCEPTION FOR MULTIPLE SUPPORT AGREEMENT.—This subsection shall not apply in any case where over half of the support of the child is treated as having been received rom a taxpayer under the provisions of subsection (c).

"(4) EXCEPTION FOR CERTAIN PRE-1985 INSTRUMENTS.—

"(A) IN GENERAL.—A child of parents described in paragraph (1) shall be treated as having received over half his support during a calendar year from the noncustodial parent if—

"(i) a qualified pre-1985 instrument between the parents applicable to the taxable year beginning in such calendar year provides that the noncustodial parent shall be entitled to any deduction allowable under section 151 for such child, and

"ii) the noncustodial parent provides at least $600 for the support of such child during such calendar year.

For purposes of this subparagraph, amounts

expended for the support of a child or children shall be treated as received from the noncustodial parent to the extent that such parent provided amounts for such support.

"(B) QUALIFIED PRE-1985 INSTRUMENT.—For purposes of this paragraph, the term 'qualified pre-1985 instrument means any decree of divorce or separate maintenance or written agreement—

"(i)which is executed before January 1,1985.

"(ii)which on such date contains the provision described in subparagraph (A)(i),and

"(iii)which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement.

"(5) SPECIAL RULE FOR SUPPORT RECEIVED FROM NEW SPOUSE OF PARENT.—For purposes of this subsection,in the case of the remarriage of a parent,support of a child received from the parent's spouse shall be treated as received from the parent.

"(6) CROSS REFERENCE.—

"For provision treating child as dependent of both parents for purposes of medical expense deduction,see section 213(dk4)."

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## TREASURY REGULATIONS INVOLVED

(Relevant Parts)

26 CFR 1.151

DEDUCTIONS FOR PERSONAL EXEMPTIONS

§1.151-1 Deductions for personal exemptions.

(a) In general. (1) In computing taxable income, an individual is allowed a deduction for the exemptions specified in section 151. Such exemptions are:

(iv) the exemptions for dependents or the taxpayer.

§1.151-2 Additional exemptions for dependents.

(a) Section 151(e) allows to a taxpayer an exemption for each dependent (as defined in section 152) whose gross income (as defined in section 61) for the calendar year in which the taxable year of the taxpayer begins is less than the amount provided in section 151(e)(1)(A) applicable to the taxable year of the taxpayer, or who is a child of the taxpayer.

(b) The only exemption allowed for a dependent of the taxpayer is that provided by section 151(e).

§1.151-3 Definitions

(a) Child. For purposes of sections 151(e), 152 and the regulations thereunder, the term "child" means a son, stepson, daughter, stepdaughter.

26 CFR 1.152-1 General definition of a dependent.

(a)(1) For purposes of the income taxes imposed on individuals by chapter 1 of the Code, the term "dependent" means any individual described in paragraphs (1) through (10) of section 152(a) over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer.

(2)(i) For purposes of determining whether or not an individual received, for a given calendar year, over half of his support from the taxpayer, there shall be taken into account the amount of support received from the taxpayer as compared to the entire amount of support which the individual received from all sources, including support which the individual himself supplied...

(b) Section 152(a)(9) applies to any individual other than an individual who at any time during the taxable year was the spouse, determined without regard to section 153, of the taxpayer) who lives with the taxpayer and is a member of the taxpayer's household during the entire taxable year of the taxpayer. An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law. It is not necessary under section 152(a)(9) that the dependent be related to the taxpayer... It is necessary, however, that the taxpayer both maintain and occupy the household...

(c) In the case of a child of the taxpayer who is under 19 or who is a student, the taxpayer may claim the dependency exemption for such child provided he has furnished more than one-half of the support of such child for the calendar year in which the taxable year of the taxpayer begins, even though the income of the child for such calendar year may be equal to or in excess of the amount

determined pursuant to §1.151-2 applicable to such calendar year. In such a case there may be two exemptions claimed for the child: One on the parent's (or stepparent's) return, and one on the child's return.
26 CFR 1.152-2
(d) In the case of a joint return it is not necessary that the prescribed relationship exist between the person claimed as a dependent and the spouse who furnishes the support; it is sufficient if the prescribed relationship exists with respect to either spouse.

§1.152-4 Support test in case of child of divorced or separated parents.
(a) Applicability. For taxable years beginning after December 31, 1966, the provisions of section 152(e) and this section relate to a determination of which of separated parents (that is parents who are divorced or legally separated under a decree of divorce or separate maintenance, or separated under a written separation agreement) is to be treated for purposes of section 152(a) and §1.152-1 as having provided more than half of the support of a child, as defined in section 151(e) and this section to apply either parent or both parents combined must provide more than one-half of the child's total support, within the meaning of §1.152-1(a)(2)(i) during the calendar year in which the taxable year of the parent who is claiming the child as a dependent begins; and such child must be in the custody of one or both of his parents for more than one-half of the calendar year. Thus, section 152(e) and this section do not apply if a person other than the parents provides one-half or more for the support of such child during the calendar year or has custody of the child for one-half or more of the calendar year... (Emphasis added.)

§1.152-4 (d) Exceptions—(1) In general. Notwithstanding paragraph (c) of this section, a child shall be treated as receiving over half of his support during the calendar year from the parent who is not the custodial parent (hereinafter referred to as the "noncustodial parent") if the conditions of subparagraph (2) ....of this paragraph are met.

(2) Decree or agreement. A noncustodial parent who provides at least $600 for the support of a child during the calendar year shall be treated as having provided more than half of the support of the child if the decree of divorce or of separate maintenance or a written agreement between the parents applicable to the taxable year of the noncustodial parent beginning in such calendar year,provides that the noncustodial parent shall be entitled to any deduction allowable under section 151 as an exemption for the dependent child...

§1.6013-1 Joint returns.

(a) In general (1) A husband and wife may elect to make a joint return under section 6013(a) even though one of the spouses has no gross income or deductions. For rules for determining whether individuals occupy the status of husband and wife for purposes of filing a joint return,see paragraph (a) of §1.6013-4.

§1.6013-4 Applicable rules.

(a) Status as husband and wife. For the purpose of filing a joint return under section 6013, the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined:

§1.6013-4(cont.)

(1) If the taxable year of each individual is the same,as of the close of such year; and

(b) Computation of income,deductions, and tax. If a joint return is made, the gross income and adjusted gross income of husband and wife on the joint return are computed in an aggregate amount and the deductions allowed and the taxable income are likewise computed on an aggregate basis...Although there are two taxpayers on a joint return,there is only one taxable income. The tax on the joint return shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

§1.6013-5 Spouse relieved of liability in certain cases

(c) Community property laws. The determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to any applicable community property laws.

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## REVENUE RULING INVOLVED

(RELEVANT PART)

Revenue Ruling 78-91 (1 CB. 36 (1978)

Children of divorced parents; support provided by custodial parent's new spouse. Support provided for the children of divorced parents by the custodial parent's new spouse will be attributed to the custodial parent in determining whether the divorced parents contributed over half the children's support during the calendar year for purposes of section 152(e) of the Code. If the divorced parents together provided over half the support, the noncustodial parent will be entitled to the dependency exemptions if a decree of divorce or written agreement so provides and the noncustodial parent contributed at least $600 for the support of each child for the year. Rev.Rul.73-175 amplied.

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LEGISLATIVE HISTORY INVOLVED

(RELEVANT PARTS)

SENATE REPORT NO. 488 (1967)

INTERNAL REVENUE—EXEMPTIONS

INTERNAL REVENUE—TAX EXEMPTIONS—
DIVORCED PARENTS

P.L. 90-78, see page 210

House Report (Ways and Means Committee) No. 102, Mar. 8, 1967 [To accompany H.R. 6056]

Senate Report (Finance Committee) No.488, Aug.3, 1967 [To accompany H.R. 6056]

Cong.Record Vo.113 (1967)

III. GENERAL EXPLANATION OF THE BILL

The bill provides specific rules for determining which of separated parents is to be entitled to the deduction for personal exemption with respect to their children. These new rules apply where the parents are divorced or legally separated under a written separation agreement. (In this respect, your committee made a technical amendment to the bill to make it clear that the new rules are to be applicable in all situations involving parents who are separated under a written separation agreement. Under the language used to accomplish this result in the bill as passed by the House, it seems likely that some of these situations would not have been covered.) The new rules apply with respect to a child only if the parents together furnish more than one-half of his support for a year, and only if the child is in the custody of his parents

Senate Report No. 488 - III. (cont.)
for more than one half of the year. Thus, the new rules do not apply where a third person contributes one-half or more of the support of the child or where the child is in the custody of a person other than his parents for one-half of the year or more. (Emphasis added.)

HOUSE REPORT NO. 102 (1967)
[H.R. 6056][1]

INCOME TAX SUPPORT TEST IN CASE OF CHILDREN OF DIVORCED PARENTS

[House of Representatives Report No. 102, Ninetieth Congress, First Session]
[March 8, 1967]

(RELEVANT PART)

III. GENERAL EXPLANATION OF THE BILL

The bill provides specific rules for determining which of separated parents is to be entitled to the deduction for personal exemption with respect to their children. These new rules apply where the parents are divorced or legally separated under a decree of divorce or of separate maintenance or are separated under a written separation agreement. They apply with respect to a child only if the parents together furnish more than one-half of his support for a year, and only if the child is in the custody of his parents for more than one-half of the year. Thus the new rules do not apply where a third person contributes one-half or more of the support of the child or where the child is in the custody of a person other than his parents for one-half of the year or more. (Emphasis added.)

Office - Supreme Court, U.S.
FILED
DEC 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-810 (2)

# In the Supreme Court of the United States

OCTOBER TERM, 1984

MAX SCHNEIER, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

3 pp

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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The court of appeals in this civil income tax case entered judgment against petitioner on June 15, 1984 (Pet. App. 1a). A petition for rehearing was denied on July 31, 1984 (Pet. App. 11a). Petitioner did not obtain an extension of time within which to file a petition for a writ of certiorari. The time for filing a petition accordingly expired on October 29, 1984, a Monday. 28 U.S.C. 2101(c). The petition was not filed until November 1, 1984. The petition, which was filed pro se, was not accompanied by a notarized statement by a member of the Bar of this Court stating that the mailing took place on a particular date within the permitted time. See this Court's Rule 28.2. The time limit

provided by Section 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

DECEMBER 1984

DOJ-1984-12

Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-810

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1984

MAX SCHNEIER,
Petitioner,

v.

COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

# REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

MAX SCHNEIER, Pro Se
P.O. BOX 9701,
MARINA DEL REY, CA. 90295
(213) 393-0505

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

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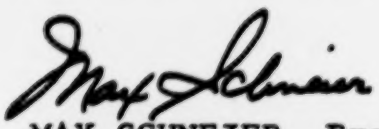
|---|---|---|
| MAX SCHNEIER, PETITIONER | ) | |
| | ) | |
| vs. | ) | No.84-810 |
| | ) | |
| COMMISSIONER OF INTERNAL REVENUE, RESPONDENT | ) | |

REPLY TO MEMORANDUM FOR

THE RESPONDENT IN OPPOSITION



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RULES OF SUPREME COURT OF THE UNITED STATES

Rule 28.2 . . . . . .

## ARGUMENT

I - Petitioner mailed 40 copies of his petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit on October 22,1984, certified mail, return receipt requested, at the U.S.Post Office, Mar Vista Station, LosAngeles,California.[1/]

Since October 29,1984, was the last day for the timely filing of the petition, its certified mailing on October 22,1984, conclusively disproves respondent's main contention of late filing in his Memorandum.[2/]

The November 1, 1984, date respondent refers to in his Memorandum is the

1/ Copy of Certified Mail Receipt, No.708 426 401, showing an October 22,1984, postmark,postage in the amount of $37.23. (See Appendix, p.1).

2/ Rule 28.2 of the Rules of the Supreme Court of the United States,states inter-alia,that "Any document shall be timely filed if it has been deposited in a U.S. Post Office with first class postage pre-paid,and properly addressed to the Clerk of this Court,within the time allowed for filing. (Emphasis added.)

docketing date, not the filing date.[3]

Also enclosed with the 40 copies of the petition was a letter of transmittal to the Clerk of the Supreme Court of the United States,[4] together with the original, notarized copies of the Certificates of Service on the Solicitor General of the United States,[5] and the Assistant Attorney General, Tax Division.[6]

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3/ Letter dated November 28, 1984, over the signature of Francis J. Lorson, Chief Deputy Clerk, Supreme Court of the United States, showing that the petition was docketed on Nov. 1, 1984, as No. 84-810. (See App. p.2)

4/ Petitioner mislaid this letter during his interim change of residence. The original should be in the files in the Clerk's office.

5/ Copy of notarized Certificate of Service on the Solicitor General of the United States dated October 22, 1984. (See App., pp.3-4)

6/ Copy of notarized Certificate of Service on Glenn L. Archer, Assistant Attorney General, Tax Division, dated October 22,1984. (See App., pp.5-6)

In addition,three (3) copies of the petition, together with a copy of the Certificate of Service were mailed on October 22, 1984 to the Solicitor General of the United States.[7/] A similar mailing was made to the Assistant Attorney-General, Tax Division on that same date.[8/]

The petitioner believed in good faith that he was following the telephone instructions of the Clerk's Office of the Supreme Court of the United States and this Court's Rules when he submitted notarized Certificates of Service on the Solicitor General of the United States and the Assistant Attorney General,Tax Division together with 40 copies of the petition and the letter of transmittal to the Clerk. If he had been aware of the notarized

7/ Copy of U.S. Postal Service, Certificate of Mailing, postmarked October 22,1984. (See App. p.7)

8/ Copy of U.S.Postal Service, Certificate of Mailing,postmarked October 22,1984. (See App. p.7)

statement requirement of Rule 28.2 to accompany the petition, it would have been no problem to have one of his law school professors, who is a member of the Bar of this Court, file such statement setting forth the mandated details concerning the mailing of the petition and its timeliness.

What is evidently unknown to the Solicitor General is the fact that the 40 copies of the petition mailed on October 22, 1984, were returned to petitioner by the Clerk of the Supreme Court on November 2, 1984.[9/] Petitioner made the required changes and remailed the 40 copies to the Clerk, Supreme Court of the United States on November 9, 1984,[10/] together with a

9/ Copy of letter dated November 2,1984, over the signature of Edward C.Schade, Assistant Clerk, stating that the petitions were being returned because "lower courts decisions and other materials in the Appendix were reduced in size" instead of being retyped in the required print size. (See App. p.8.

10/Copy of Certified mail receipt no. P. 666 210 435, postmarked November 9,1984, postage in the amount of $37.62. (See App.,p.9)

letter of transmittal[11] and original, notarized Certificates of Service on the Solicitor General of the United States[12] and the Assistant Attorney-General, Tax Division.[13]

Additionally, three (3) new corrected copies of the petition were sent to the Solicitor General on November 9,1984, together with a copy of Certificate of Service.[14] The assistant Attorney General, Tax Division was sent 3 sets of all corrections to be used to amend the copies of the petition he had already received, and a

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11/ Copy of letter of transmittal dated Nov.9,1984,addressed to Clerk Supreme Court of U.S. indicating, inter-alia,that petitioner was following the instructions of Francis J.Lorson, Chief Deputy Clerk. (See App. p.10)

12/ Copy of notarized Certificate of Service on the Solicitor General of the United States dated Nov. 9,1984) (See App.pp.11-12)

13/ Copy of notarized Certificate of Service on the Assistant Attorney General of the United States dated Nov.9,1984(See App.pp. 13-14)

14/ Copy, U.S.Postal Service Certificate of Mailing postmaked November 9,1984(See App. pp.15)

copy of the Certificate of Service.[15/]

Petitioner was telephonically assured by the Clerk's Office that, even though the petitions were returned for correction, the initial filing date of October 22,1984, would obtain.

II - Petitioner avers that it would not be consistent with the American traditions of fair play and justice to deny petitioner a review of his petition for a writ of certiorari by the Supreme Court of the United States merely because of a technicality, e.g., the Rule 28.2 requirement that a member of the Bar of the Court file a notarized statement "setting forth the details of the mailing and stating that to his knowledge the mailing took place on a particular date within the permitted time."

15/ Copy, U.S.Postal Service Certificate of Mailing postmaked November 9, 1984. (See App. p.15)

It defies common sense to suppose that such a notarized statement would be more sufficient, trustworthy,and material to prove that the mailing was properly and timely made than the actual postmarked, certified mail receipt; the letters of transmittal together with the original, notarized copies of the aforementioned Certificates of Service; and the U.S.Postal Service Certificates of Mailing previously referred to.

Additionally, petitioner respectfully requests the Court to consider the fact that he is in his final year at law school and will be taking the California bar examination in July 1985. Petitioner assures the Court that he is ever-conscious of his duties and obligations to the Court, the respondent, the Solicitor General, and the Assistant Attorney-General, Tax Division. As a future 'officer of the court,' petitioner prays,that the Court will give

appropriate weight to his letters of transmittal and his certifications of the Certificates of Service and consider them to be an acceptable substitute for Rule 28.2's requirement for the aforementioned notarized statement by a member of the Bar of this Court.

The Court has frequently stated the proposition that court determinations of issues should be based on "common sense" and the "totality of the circumstances" rather than on "rigid hypertechnical" application of rules.[16/] Also, in deciding most of its cases, the Court has invariably taken into consideration the totality of the circumstances.[17/] Petitioner

16/ Gates v. Illinois, ___U.S.___,103 S.Ct. 2317,2328,2333 (1983.)

17/ See i.e. Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252 (1977); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

prays that it will do likewise in ruling on the instant Memorandum.

It should be readily apparent from petitioner's Reply and materials in the Appendix, that petitioner acted in good faith in his efforts to comply with the Rules of the Supreme Court of the United States. It would, therefore, be neither fair nor serve the ends of justice to have his petition for a writ of certiorari summarily dismissed on a hypertechnicality, thus denying him the Court's review and decision of the important issues raised which affect not only the petitioner, but also millions of stepfathers similarly situated. Another urgent reason for the Court to grant certiorari is the strong possibility that the federal court system could be overwhelmed by ensuing litigation as a result of the recent passage of the Tax Reform Act of 1984, effective January 1, 1985, as it relates to stepfathers-as

cogently pointed out by the petitioner in his petition. It would appear to be in the respondent's and the Solicitor General's best interests to support a hearing of this petition instead of seeking to prevent it from being granted because of a mere technicality.

Since there can be no doubt that the petition was timely filed, there is no 28 U.S.C. 2101 (c) jurisdictional issue involved. Respondent's sole remaining objection, e.g., Rule 28.2's notarized statement requirement, is, at best de minimis, certainly not of the stature to deny petitioner his right to file his petition or to interfere with the Supreme Court of the United States' jurisdiction over the instant case under 28 U.S.C.2101 (c). This case involves interpretations of federal statutes and regulations and questions of Congress' plenary taxing powers being encroached upon by the

respondent with the support of the Ninth Circuit Court of Appeals.

In any event, respondent has not raised a 28 U.S.C. 2101(c) jurisdictional issue in his Memorandum based on his sole remaining objection; nor does he cite any precedent or authority in support of his position on that point.

Petitioner's de minimus error is understandable, in view of the fact that he has represented himself throughout these entire proceedings and had a good faith belief that Rule 28.2's notarization requirement did not apply to his particular case.

Certificates of Mailing and Certificates of Service for this Reply have been executed by a member of the Bar of this Court and duly notarized as required by Rule 28.2.

## CONCLUSION

In view of all of the above, petitioner prays that the Court will reject the Memorandum For The Respondent In Opposition and grant him the relief he seeks in his petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, which was timely filed on October 22, 1984.

Respectfully submitted,

Max Schneier, Pro Se
P.O. Box 9701
Marina del Rey, Ca. 90295
Tel. (213) 393-0505

P 708 426 401

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

*(See Reverse)*

| | |
|---|---|
| Sent to Alexander Stevas | |
| Street and No. Clerk of the Supreme Court of U.S. | |
| P.O., State and ZIP Code Washington, D.C. 20543 | |
| Postage | $ 31.40 |
| Certified Fee | .75 |
| Special Delivery Fee | |
| Restricted Delivery Fee | |
| Return Receipt Showing to whom and Date Delivered | .60 |
| Return receipt showing to whom, Date, and Address of Delivery | |
| TOTAL Postage and Fees | $ 31.23 |
| Postmark or Date | |

* U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

LOS ANGELES, CALIF. OCT 22 1984 MAR VISTA STA.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C.20543

November 28, 1984

Mr. Max Schneier
4150 Via Dolce # 224
Marina del Rey,Ca.90291

Re: Max Schneier,
v. Commissioner of Internal Revenue
No. 84-810

Dear Mr. Schneier:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on November 1, 1984 as No. 84-810.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Very truly yours,

Alexander L. Stewas, Clerk

by

Francis J. Lorson
Chief Deputy Clerk

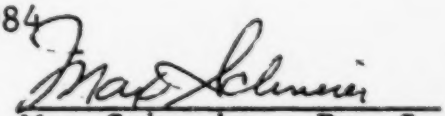
Enclosures

## CERTIFICATE OF SERVICE

It is hereby certified that service of this, PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS BEEN MADE TO THE SOLICITOR GENERAL, on this 22nd day of October, 1984, by mailing three copies thereof, in an envelope, with postage prepaid, properly addressed to him as follows:

SOLICITOR GENERAL OF THE UNITED STATES,
U.S. DEPARTMENT OF JUSTICE,
ROOM 5614
WASHINGTON, D.C. 20530

Dated: October 22, 1984



Max Schneier, Pro Se
4150 Via Dolce # 224
Marina del Rey, Ca.
90292
(213) 823-7473

See next page for notary's affirmation.

App. 4

STATE OF CALIFORNIA
COUNTY OF Los Angeles } ss.

On October 22, 1984 before me, the undersigned, a Notary Public in and for said State, personally appeared Max Schneier

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same.

WITNESS my hand and official seal.

Signature Cece Sanders

OFFICIAL SEAL
CECE SANDERS
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires August 29, 1986

(This area for official notarial seal)

## CERTIFICATE OF SERVICE

It is hereby certified that service of this, PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT has been made to respondent, on this 22nd day of October, 1984, by mailing three copies thereof, in an envelope, with postage pre-paid, properly addressed to him as follows:

GLENN L. ARCHER, SR.,
ASSISTANT ATTORNEY GENERAL
TAX DIVISION
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

Dated: October 22, 1984

Max Schnier, Pro Se
4150 Via Dolce # 224
Marina del Rey, Ca.90292
(213) 823-7473

See next page for notary's affirmation.

STATE OF CALIFORNIA } ss.
COUNTY OF Los Angeles }

On October 22, 1984 before me, the undersigned, a Notary Public in and for said State, personally appeared Max Schneier

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same.

WITNESS my hand and official seal.

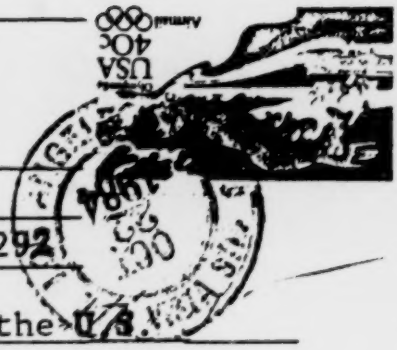
Signature Cece Sanders

OFFICIAL SEAL
CECE SANDERS
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires August 23, 1986

(This area for official notarial seal)

3001 (6/82) (Individual) First American Title Company

U.S. POSTAL SERVICE
**CERTIFICATE OF MAILING**



Received From:

Max Schneier

P.O.Box 9701

Marina del Rey, Ca.90292

One piece of ordinary mail addressed to:

Solicitor General of the U.S.

U S.Dept of Justice,Room 5614

Washington, D.C 20530

MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE — POSTMASTER

PS FORM 3817 MAY 1976 *U.S. GOVERNMENT PRINTING OFFICE: 1982 - 556-250

U.S. POSTAL SERVICE
**CERTIFICATE OF MAILING**

Received From:

Max Schneier

P.O.Box 9701

Marina del Rey,Ca 90292

One piece of ordinary mail addressed to:

Glenn L.Archer Sr. Assistant Atty.General

Tax Division U.S.Dept of Justice,

Washington, D.C. 20530

MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE — POSTMASTER

PS FORM 3817 MAY 1976 *U.S. GOVERNMENT PRINTING OFFICE: 1982 - 556-250

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

November 2, 1984

Mr. Max Schneier
4150 Via Dolce # 224
Marina del Rey, Ca. 90292

Re: Max Schneier v. Commissioner of
Internal Revenue

Dear Mr. Schneier:

This Court's Rules require that any pleading and the appendices thereto, must be be printed or typewritten in the same size and style as that required by the Court's Rules. This does not allow for any reduction of lower court decisions or other materials.

I therfore return your petition with the recommendation that you revise the appendix and resubmit this pleading as soon as possible.

Very truly yours,

Alexander L. Stevas, Clerk

By

Edward C. Schade
Assistant Clerk

cdd
Enc.

P 666 210 435

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

*(See Reverse)*

| | |
|---|---|
| Sent to Alexander Stevas, Clerk | |
| Street and No. Supreme Court of the U.S. | |
| P.O. State and ZIP Code WASHINGTON, D.C. 20543 | |
| Postage | $36.25 |
| Certified Fee | 75 |
| Special Delivery Fee | |
| Restricted Delivery Fee | |
| Return Receipt Showing to whom and Date Delivered | 60 |
| Return receipt showing to whom, Date, and Address of Delivery | |
| TOTAL Postage and Fees | $37.60 |
| Postmark or Date | VENICE, CA NOV |

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

November 9, 1984

Alexander Stevas, Clerk,
Supreme Court of the United States,
Washington, D.C. 20543

Re: Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit
Max Schneier
Petitioner
Commissioner of Internal Revenue,
Respondent

Dear Mr. Stevas:

Please find enclosed forty copies of my Petition.

The Appendix has been revised and retyped in the same size and style as that required by the Court's Rules, as ordered by Edward C. Schade, Assistant Cler, on November 2, 1984. In addition, the note numbers in the Petition have been conformed with the revised appendix page numbers.

Three new completely revised copies of the Petition were sent to the Solicitor General of the United States and revised Appendixes, and inserts, with instructions,to the Department of Justice,Tax Division,Counsel to respondent as per Mr.Larsen's instructions. Proofs of service are contained herein.

For your information,

Max Schneier

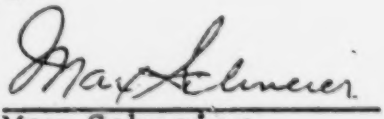
Max Schneier,
4150 Via Dolce # 224
Marina del Rey,Ca. 90292
(213) 823-7473

CERTIFICATE OF SERVICE

It is hereby certified that service of this completely revised PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS BEEN MADE TO THE SOLICITOR GENERAL, on this 9th day of November, 1984 by mailing three copies thereof, in an envelope, with postage prepaid, properly addressed to him as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U.S. DEPARTMENT OF JUSTICE
ROOM 5614
WASHINGTON, D.C. 20530

Dated: November 9th, 1984



Max Schneier,
Pro Se,
4150 Via Dolce # 224
Marina del Rey, Ca.
90292
Tel. (213) 823-7473

See next page for notary's affirmation.

App. 12

3001 (6/82) (Individual) First American Title Company

STATE OF CALIFORNIA
COUNTY OF Los Angeles } ss.

On November 9, 1984 before me, the undersigned, a Notary Public in and for said State, personally appeared Max Schneier

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same.

WITNESS my hand and official seal

Signature Cece Sanders

OFFICIAL SEAL
CECE SANDERS
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires August 29, 1986

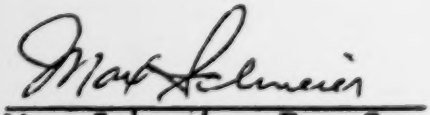
(This area for official notarial seal)

CERTIFICATE OF SERVICE

It is hereby certified that service of this, REVISED APPENDIX AND INSERTS, WITH COMPLETE INSTRUCTIONS, TO THIS PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS BEEN MADE TO RESPONDENT, on this 9th day of November 1984, by mailing three copies thereof, in an envelope, with postage prepaid, properly addressed to him as follows:

GLENN L. ARCHER, SR., ASSISTANT ATTORNEY GENERAL,
TAX DIVISION, U.S. DEPARTMENT OF JUSTICE,
WASHINGTON, D.C. 20530

Dated: November 9, 1984



Max Schneier, Pro Se
4150 Via Dolce, # 224
Marina del Rey, Ca.
90292
(213) 823-7473

See next page for notary's affirmation.

STATE OF CALIFORNIA
COUNTY OF Los Angeles } ss.

On November 9, 1984 before me, the undersigned, a Notary Public in and for said State, personally appeared Max Schneier

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same.

WITNESS my hand and official seal.

Signature [signature]

OFFICIAL SEAL
[illegible]
My Commission [illegible]

(This area for official notarial seal)

3001 (6/82) (Individual) First American Title Company

U.S. POSTAL SERVICE
**CERTIFICATE OF MAILING**

Received From:

MAX SCHNEIER

4150 VIA DOLCE # 224

MARINA DELREY, CA. 90292

One piece of ordinary mail addressed to:

SOLICITOR GENERAL OF THE UNITED STATES

U.S. DEPARTMENT OF JUSTICE

ROOM 5614, WASHINGTON D.C. 20530

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U.S. POSTAL SERVICE
**CERTIFICATE OF MAILING**

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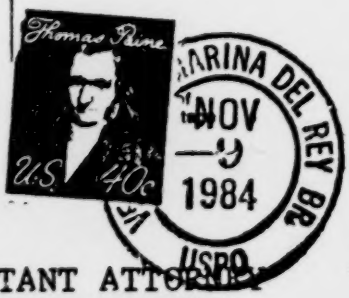


One piece of ordinary mail addressed to:

GLENN L. ARCHER, SR. ASSISTANT ATTORNEY

GENERAL - TAX DIVISION

U.S.DEPT. OF JUSTICE, WASHINGTON, D.C.20530

MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE — POSTMASTER

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